86-1575

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Section 36(c) of the McFadden Act, codified in the National Bank Act at 12 U.S.C. § 36(c) (1952), provides that a national bank may branch in a state only if it meets the branching restrictions imposed by that state's law on state banks. Section 36(h) of the McFadden Act defines a state bank, again by reference to state law.

The question presented is whether a national bank may engage in branching that is prohibited by state law for state banks, on the ground that such branching is permitted for state savings and loan institutions, thereby placing state banks in a position of competitive inequality with national banks in the matter of branching.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

STATUTES:

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Department of Banking and Consumer Finance of the State of Mississippi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is *Department of Banking and Consumer Finance of the State of Mississippi v. Clarke*, 809 F.2d 266 (5th Cir. 1987), and appears in the appendix ("App.") beginning at 35a. The opinion of the District Court for the Southern District

of Mississippi is *Department of Banking and Consumer Finance of the State of Mississippi v. Selby*, 617 F. Supp. 566 (S.D. Miss. 1985), and appears at App. 21a. The decision of the Comptroller of the Currency is unreported and appears at App. 1a.

JURISDICTION

The final judgment of the Court of Appeals was entered on February 9, 1987. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the Statutory Appendix, *infra*, pp. 15-17.

STATEMENT

This case arises out of a decision by the Comptroller of the Currency to permit Deposit Guaranty National Bank of Jackson, Mississippi ("Deposit Guaranty") to established a branch in Gulfport, Mississippi. App. 20a. Federal law permits national banks to branch in a state only to the extent that state law in the state permits state banks to branch. This Congressional requirement was established by the McFadden Act of 1927, codified in the National Bank Act at 12 U.S.C. § 36 ("The McFadden Act"), which says in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c) (1952). This Court has held that the purpose of this statutory provision is to "place national and state banks on a basis of 'competitive equality' insofar as branch banking [is] concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

In making his decision in this case, the Comptroller recognized that the Mississippi statute governing its state chartered banks, which restricted such branching to within 100 miles of the bank's main office, would preclude the branching requested by Deposit Guaranty, to be located more than 100 miles from its main office. App. 1a-2a. *See* Miss. Code Ann. §§ 81-7-5 and 81-7-7 (1972). The Comptroller noted, however, that under a different section of the Mississippi Code relating to the incorporation and regulation of state savings and loan associations, such associations are authorized to branch without a territorial limitation and thus may branch statewide. App. 2a. *See* Miss. Code Ann. § 81-12-175 (Supp. 1986). The Comptroller did not then evaluate state law further. Instead, he looked to the definition of "state bank" in Section 36(h) of the McFadden Act:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. § 36(h) (1927). The Comptroller concluded that the language of Section 36(h) establishes a federal "functional" definition of "state bank" (App. 4a-14a), and that under that definition savings and loans in Mississippi compete to some extent with banks,[1] although they

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[1] In making this determination, the Comptroller relied "chiefly" upon a consultant study and subsequent report prepared for Deposit Guaranty by Golembe Associates, Inc. From that study and report, the Comptroller concluded that Mississippi savings and loans offer certain services in competition with commercial banks sufficient to

are not chartered as banks and although they are statutorily more restricted than banks in the services they can provide to the public. The Comptroller, therefore, concluded that the McFadden Act permits Deposit Guaranty to branch to the extent that Mississippi allowed branching by state savings and loans, i.e., without geographic restrictions, and, on July 9, 1985, the Comptroller gave Deposit Guaranty approval to open the requested branch in Gulfport.

The branching the Comptroller permitted for Deposit Guaranty would not have been permissible for any of Mississippi's state-chartered banks and would have put those state-chartered banks at a competitive disadvantage vis-a-vis Deposit Guaranty in the scope of permissible branching, an outcome the Department contends the McFadden Act was intended to preclude. Consequently, the day after the Comptroller issued his decision, the Department of Banking and Consumer Finance of the State of Mississippi brought this action against the Comptroller and Deposit Guaranty in the federal district court for the Southern District of Mississippi, challenging the Comptroller's decision under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* The action was brought for a declaratory judgment that the Comptroller's decision was unlawful, and therefore null and void, and preliminary and permanent injunctive relief prohibiting the Comptroller from issuing a certificate of authority for the proposed branch and prohibiting Deposit Guaranty from establishing or operating the branch. The court issued a preliminary injunction on July 16, 1985.

The Department of Banking and Consumer Finance of the State of Mississippi and several state bank intervenors (hereinafter collectively referred to as "Department") contended that the Comptroller was ignoring the express language of Sections 36(c) and 36(h) of the

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bring them into the "business of banking." App. 18a-20a. *But see infra* note 4 and accompanying text.

McFadden Act that incorporates state law, and was ignoring Congressional intent, demonstrated in the legislative history of the Act and confirmed by this Court,[2] to maintain competitive equality between state and national banks in the matter of branching. The Department noted that under Section 36(h) the term "State bank" includes only those "institutions carrying on the banking business under the authority of State law," and further contended that savings and loan associations did not fall under the provision of Mississippi law governing the chartering and operating of state-chartered banks. *See* Miss. Code Ann. § 81-7-1 *et seq.* (1972). In addition, state savings and loans are subject to limitations that are not applicable to commercial banks (such as Deposit Guaranty). *See* Miss. Code Ann. § 81-12-1 *et seq.* (Supp. 1986). The Department further urged that the absence of any reference to savings and loans in the McFadden Act or in the legislative history dealing with the branching restrictions of the Act reflects the long-standing Congressional intent that savings and loans be treated separately from banks. It was argued that as a result, neither the language of the Act nor its legislative history provide support for the proposition that Congress ever intended the McFadden Act to permit competitive inequality between state banks and national banks in the matter of branching by yoking the branching powers of national banks to those accorded by a state or by Congress to savings and loan associations.[3] The Department pointed out that, consist-

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[2] *See First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252.

[3] In 1933, when Congress amended the McFadden Act in the Banking Act of 1933, Congress passed a separate statute authorizing the establishment of federal savings and loans. Home Owners' Loan Act of 1933, *codified at* 12 U.S.C. §§ 1461-1470 ("HOLA"). Neither statute indicated any interrelationship between the branching activities of the two types of institutions. In fact, the branching of savings and loans has been determined to be an implied power

ent with this historically separate treatment of banks versus savings and loans, the recently enacted Garn-St. Germain Depository Institutions Act of 1982, while expanding the powers of federal savings and loans, continued to significantly circumscribe the powers of savings and loans in comparison to the powers of banks and to maintain the traditional differences between banks and savings and loans.[4]

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in the statute to be implemented by the HOLA-created Federal Home Loan Bank Board ("FHLBB"). *North Arlington Nat'l Bank v. Kearney Federal Savings & Loan Ass'n*, 187 F.2d 564 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); *First Nat'l Bank of McKeesport v. First Federal Savings & Loan Ass'n of Homestead*, 225 F.2d 33, 35 (D.C. Cir. 1955). Further, banks do not have the right to protest savings and loan branching on the grounds that they compete with those institutions (*Union Nat'l Bank of Clarksburg v. Home Loan Bank Board*, 233 F.2d 695 (D.C. Cir. 1956)), and the impact of savings and loan branching on banks need not be considered by the FHLBB. *First Nat'l Bank of Baudette v. Savings & Loan Ass'n of Bemidji*, 670 F.2d 796 (8th Cir. 1982). Moreover, in contrast to the McFadden Act restrictions on national bank branching, the FHLBB may permit federal savings and loans to branch regardless of state restrictions on state savings and loans. *Independent Bankers Ass'n of America v. FHLBB*, 557 F. Supp. 23 (D.D.C. 1982). Thus, there is no evidence of congressional intent to link the branching authority of federal and state savings and loan associations, much less the branching authority of such associations to banks.

[4] The Garn-St. Germain Depository Institutions Act of 1982 is codified at 12 U.S.C. § 1461 *et seq.* In anticipation of this Act, Mississippi enacted a law that automatically expands the powers of Mississippi savings and loans with the expanded powers of federal savings and loans. Miss. Code Ann. § 81-12-49(r) (Supp. 1986). The powers of savings and loans continue to be restricted, in comparison to banks, in key respects. For example, under 12 U.S.C. § 1464(b) (1983), a federal savings and loan association may accept demand deposits *only* from persons or organizations having a business, corporate, commercial, or agricultural loan relationship with the savings and loan association, or from a commercial, corporate, business or agricultural entity for the sole purpose of effectuating payments thereto by a non-business customer. In contrast, there are *no* limitations on the ability of a national or Missis-

The district court entered final judgment for the Department and issued a permanent injunction. The Comptroller and Deposit Guaranty appealed to the Fifth Circuit Court of Appeals. A panel of that court reversed the district court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below is in Conflict with the Decisions of Two Other Federal Courts of Appeals

Both the Ninth and Eighth Circuits have held that the McFadden Act prohibits national banks from branching in a state to a greater degree than the state-chartered banks in that state, in reliance upon the branching authority granted to *other* state financial institutions. As a result, the decisions of the Ninth Circuit and Eighth Circuit are in direct conflict with the decision of the Fifth Circuit in this case. Although the applicability of these decisions was vigorously argued before the

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sippi commercial bank to accept demand deposits. *See* 12 U.S.C. § 24 (1984); Miss. Code Ann. § 81-5-1 (1972). Similarly, *compare* 12 U.S.C. § 1464(c)(1)(R) (1982) (regarding commercial loans) *with* 12 U.S.C. § 24 and Miss. Code Ann. § 81-5-1; *compare* 12 U.S.C. § 1464(c)(2)(B) (1982) (regarding consumer loans) *with* 12 U.S.C. § 24 and Miss. Code Ann. § 81-5-1; *compare* 12 U.S.C. § 1464(c)(2)(A) (1982) (regarding commercial leasing) *with* 12 U.S.C. § 24 and Miss. Code Ann. § 81-5-1; *compare* 12 U.S.C. § 1464(c)(1)(B) (1982) (regarding commercial real estate loans) *with* 12 U.S.C. § 24 and Miss. Code Ann. § 81-5-1. The recently enacted changes were intended to and have been used by savings and loans to strengthen their ability to perform their traditional housing financing role, rather than as a vehicle for transforming savings and loan institutions into commercial banks. Senator Garn explained that the Garn-St. Germain Act was intended "to provide additional asset flexibility and earnings opportunities to thrift institutions in the long-term . . . . By limiting such powers, the legislation maintains the traditional distinctions between commercial banks and thrift institutions." 128 Cong. Rec. S12213 (daily ed. Sept. 24, 1982).

court below, its opinion does not even mention, much less discuss, these decisions.

In *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979), the Comptroller had approved a relocation of a branch of a national bank in Washington state which the circuit court determined would have been illegal for a state-chartered bank. The national bank and the Comptroller relied on the same arguments presented by respondents in this case—that even if state-chartered banks are precluded from such branching, national banks are not if another state financial institution, in that case a mutual savings bank, could engage in such branching. *Id.* at 279. The Ninth Circuit concluded that the state law governing mutual savings banks in Washington did not provide a basis for branch relocation by a national bank. *Id.* at 279-80.

The reasoning of the Ninth Circuit is directly applicable here and puts the Ninth Circuit squarely at odds with the Fifth Circuit decision in this case. First, the court concluded that the references to state law in Sections 36(c) and 36(h) of the McFadden Act require that state law be used to determine the definition of "state bank." *Id.* at 279. Then the court concluded that, under Washington state law, a mutual savings bank is not a "state bank" and that, therefore, the branching permitted Washington state mutual savings banks could not be used to justify branching by a national bank. *Id.* at 279-80. Finally, the court concluded that even if a mutual savings bank in Washington were a "state bank" for purposes of the McFadden Act, the requirement of Section 36(c) of the McFadden Act that national bank branching rights are "subject to the restrictions as to location imposed by the law of the State on State banks" means that a national bank may not avail itself of the branching right of such a mutual savings bank unless the national bank satisfies all of the provisions of the state statute governing mutual savings banks. *Id.* at 280.

Thus, in order to take advantage of the branching privilege afforded state mutual savings banks, the national bank (like a state-chartered institution) would also have to meet the requirements imposed as a condition for the establishment of a mutual savings bank.

Two years earlier, in *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977), the Comptroller had determined that a national bank should be able to engage in branching that state law would not permit for state-chartered banks, because in the Comptroller's view, the Bank of North Dakota, a state-owned bank, had no branching restrictions. The court decided that Section 36(h) of the McFadden Act does not permit a national bank to branch in reliance on the branching privileges enjoyed by the state itself in its banking endeavors when such branching is prohibited for private state-chartered banks. The court concluded that to hold otherwise would be inimical to the policy of competitive equality between private banks that underlies the McFadden Act. *Id.* at 356.[5]

II. The Decision Below is Contrary to Decisions of this Court

This Court has already addressed the issue of the extent to which state law should be applied in determining

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[5] The decision below is also in conflict with decisions of two district courts. *See First Nat'l Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C (E.D. Okla. Nov. 15, 1982 and Dec. 17, 1982) (trust companies are "separate and distinct creations from state banks . . . not chartered as state banks . . . and do not carry on the banking business under authority of state law."); *State Chartered Banks in Washington v. Peoples Nat'l Bank of Washington*, 291 F. Supp. 180, 198-99 (W.D. Wash. 1966) (national bank could not take advantage of the branching privileges afforded state-chartered mutual savings banks unless it met all of the requirements of the state statute governing mutual savings banks).

whether a national bank may engage in branch banking under the McFadden Act.

In *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, the Comptroller argued, as the Comptroller argues in this case, that he is not confined by state branching restrictions. The Comptroller contended that since the state permitted branching by banks by taking over an existing bank, First National Bank could branch as well *and* would not be confined in doing so to taking over an existing bank. The Comptroller's argument was that, under the McFadden Act, state law governs only "whether" and "where" branches may be located, but not the "method" of branching. This Court rejected the Comptroller's selective use of the state statute, explaining "[i]t is a strange argument that permits one to pick and choose what portion of the law binds him" (*id.* at 261), and concluding that restrictions that are part and parcel of the state law governing branching are "absorbed by the provisions of §§ 36(c)(1) and (2). . . ." *Id.* at 261-62. This Court explained further that when a state expresses the conditions under which it will permit branching, "it expresses as much 'whether' and 'where' a branch may be located" as when it states an explicit geographic prohibition (*id.* at 262), and "[i]t is not for us to so construe the Acts as to frustrate this clear-cut purpose [of achieving "competitive equality" in branch banking] so forcefully expressed by both friend and foe of the legislation at the time of its adoption." *Id.* at 261.

In accordance with the decision of the Court in *Walker*, the Mississippi state law provisions regarding state bank branching are "absorbed" into the McFadden Act. Since the state law does not permit "state banks" to engage in the branching sought by Deposit Guaranty, Deposit Guaranty is precluded from that branching as well. *See* Miss. Code Ann. § 81-7-7 (Supp. 1986). Nor does Deposit Guaranty meet the Mississippi requirements for designa-

tion as a savings and loan, as it must to be eligible to branch under the provisions of the Mississippi statute governing savings and loans. *See* Miss. Code Ann. § 81-12-1 *et seq.* (Supp. 1986). In short, the decision below rests upon precisely the kind of selective use of state statutes that this Court found impermissible in *Walker*.

First National Bank in Plant City v. Dickinson, 396 U.S. 122, dealt with the issue of whether an armored car messenger service and other off-premises receptacles used by a national bank in Florida for the receipt of packages containing cash or checks for deposit constituted branch banks under the definition of a branch in Section 36(f) of the McFadden Act, 12 U.S.C. § 36(f) (1927). The Comptroller, using his interpretation of the federal definition of "branch," approved the national bank's use of off-premises receptacles. This interpretation would have placed state banks in Florida at a competitive disadvantage vis-a-vis national banks, since Florida laws prohibited such branch banking by state banks. *Id.* at 124-25, 130-31, 138. Unlike Section 36(h), Section 36(f) makes no reference to state law. Even so, this Court held that the federal definition of Section 36(f) was to be applied in a manner that would implement the underlying purpose of the branching requirements of the McFadden Act—to assure competitive equality. Echoing the point made earlier in *Walker*, this Court emphasized in its closing statement that "the congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." 396 U.S. at 138.

III. The Question Involved Is of Broad Significance, Affecting Over Twenty States, and Therefore Has National Impact

Twenty-two states, including Mississippi, grant savings and loan associations broader branching rights than

banks.[6] Under the reasoning of the court below, the state-chartered banks of all of these states would be subjected

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[6] For Arkansas, *compare* Ark. Stat. Ann. § 67-360 (1980) *with* Ark. Stat. Ann. § 67-1866 (1980); for Colorado, *compare* Colo. Rev. Stat. § 11-6-101 (Supp. 1983) *with* Colo. Rev. Stat. § 11-41-120 (1973); for Georgia, *compare* Ga. Code Ann. § 7-1-601 (1982) *with* Ga. Code Ann. § 7-1-777 (1982); for Illinois, *compare* Ill. Ann. Stat. Ch. 17 § 3010 (1981) *with* Ill. Ann. Stat. Ch. 17 § 3301-9 (Supp. 1986); for Indiana, *compare* Ind. Code Ann. § 28-2-13-1 (1986) *with* Ind. Code Ann. § 28-4-3-1 *et seq.* (1986); for Kansas, *compare* Kan. Stat. § 9-1111 (Supp. 1986) *with* Kan. Stat. § 17-5225 (Supp. 1986); for Kentucky, *compare* Ky. Rev. Stat. § 287.180 (Supp. 1986) *with* Ky. Rev. Stat. § 289.061 (1981); for Michigan, *compare* Mich. Stat. Ann. § 487.471 (Supp. 1986) *with* Mich. Stat. Ann. § 491-522 (Supp. 1986); for Missouri, *compare* Mo. Ann. Stat. § 362.105 (Supp. 1987) *with* Mo. Ann. Stat. § 369.329 (Supp. 1987); for New Mexico, *compare* N.M. Stat. Ann. § 58-5-3 (Supp. 1985) *with* N.M. Stat. Ann. § 58-10-17 (Supp. 1983); for Ohio, *compare* Ohio Rev. Code Ann. § 1111.03 (Supp. 1985) *with* Ohio Rev. Code Ann. § 1151.05 (1968); for Oklahoma, *compare* Okla. Stat. Ann. Tit. 6 § 501 (Supp. 1987) *with* Okla. Stat. Ann. Tit. 18 § 381.24 (1986); for Pennsylvania, *compare* Pa. Stat. Ann. Tit. 7 § 904 (Supp. 1986) *with* Pa. Stat. Ann. Tit. 7 § 6020-53 (Supp. 1986); for Tennessee, *compare* Tenn. Code Ann. § 45-2-614 (Supp. 1985) *with* Tenn. Code Ann. § 45-3-301 *et seq.* (1980); for Wisconsin, *compare* Wis. Stat. § 221.04 (1982) *with* Wis. Stat. §§ 215.03(8) and 215.13(39) (Supp. 1986). For Iowa, state bank branching is restricted by Iowa Code Ann. § 524-120 (Supp. 1986), but there is no restriction on savings and loan branching. *See* Atty. Gen. Op. (Smith) Nov. 5, 1973. For Minnesota, State bank branching is restricted by Minn. Stat. Ann. §§ 47.52 and 48.34 (Supp. 1987), but there is no restriction for state savings and loans. *See* Minn. Stat. Ann. § 51A.58 (Supp. 1987). For Nebraska, state bank branching is restricted by 1986 Neb. Laws 2d Sess. § 8-157, but there is no restriction for state savings and loans. *See First Federal Savings & Loan Ass'n. of Lincoln v. Dept. of Banking*, 192 N.W.2d 736 (1971). For North Dakota, state bank branching is restricted by N.D. Cent. Code § 6-03-13.1 (Supp. 1985), but no statute restricts state savings and loan branching. For Texas, state bank branching is restricted by 1986 Tex. Sess. Law Serv. Art. 342-903 (Vernon), but no statute restricts state savings and loan branching. For Wyoming, state bank branching is restricted (*see* 1986 Wyo. Sess. Laws § 13-4-203(c)-(e)), but state savings and loan branching is not. Wyo. Stat. § 13-7-102 (1977).

to competition from national banks with broader branching privileges, or, to prevent that inequity, the state legislatures of these states would be forced to expand branching privileges for state-chartered banks. This is contrary to the fundamental purpose of the McFadden Act to maintain competitive equality between state and national banks in the matter of branching. The McFadden Act cannot be construed expansively to accommodate national banks, in violation of this purpose:

> The branch banking provisions of the McFadden . . . Act represented the minimum of concession which the anti-branch bank forces were willing to make, and its general purpose was to stifle the development of branch banking and to freeze it in its status quo.

J. Chapman & R. Westerfield, *Branch Banking* 108 (1980 reprint), *quoted in Clarke v. Securities Industry Association*, —— U.S. ——, 107 S. Ct. 750, 764 n.3 (1987) (Stevens, J., concurring). In recognition of this statutory intent, this Court has refused to countenance what it has previously described as the Comptroller's "systematic attempt to secure for national banks branching privileges [a state] denies to competing state banks." *First National Bank in Plant City v. Dickinson*, 396 U.S. at 138.

The Comptroller's unjustifiably expansive interpretation of the McFadden Act, one that has been attempted and ultimately rejected in four previous cases, has the potential to impose sweeping change in the nature of banking in a large number of states. In view of the language and legislative history of the McFadden Act, and the existing case law, such a sweeping change in the way the Act has been construed should not be imposed by administrative action without a full review by this Court.

As this Court has explained with respect to another banking statute, if the statute falls short of providing the safeguards necessary to protect the public interest, that is a problem for the legislature, not a federal gov-

ernment administrator, or the courts, to address. *Board of Governors v. Dimension Financial Corp.*, —— U.S. ——, 106 S. Ct. 681, 689 (1986).[7]

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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[7] In 1986, Mississippi passed a law that gradually will extend the geographic scope of permissible branching by state banks that meet certain conditions. Miss. Code Ann. § 81-7-1 *et seq.* (Supp. 1986). Accordingly, Deposit Guaranty has had its opportunity to change the law in the proper forum. However, the branching sought by Deposit Guaranty is still impermissible for Mississippi state banks.

STATUTORY APPENDIX

STATUTORY APPENDIX

The relevant portion of Section 36(c) of the McFadden Act, 12 U.S.C. § 36(c), provides as follows:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

Section 36(f) of the McFadden Act, 12 U.S.C. § 36(f), provides as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Section 36(h) of the McFadden Act, 12 U.S.C. § 36(h), provides as follows:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

Miss. Code Ann. § 81-7-5 (1972) provided as follows:

> Branch offices in certain cities—permission of state comptroller—branch offices may make loans.
>
> The state comptroller may permit banks to establish branch offices within the corporate limits of the

city where the bank is domiciled when the population is not less than ten thousand (10,000), and within the limits of the county wherein such bank is domiciled, and within the limits of any county adjacent to the county within which such bank is domiciled. No branch office shall be established in any town or city of less than three thousand five hundred (3,500) population where such town or city has one or more banks or branch banks in operation. Such offices shall not be considered branch banks within the meaning of this chapter, and no additional capital shall be required therefor. Such branch offices may make loans, and the notes or other evidence thereof, with all the collateral thereto belonging, may remain in said branch office of origin, or may be transmitted to and held in any other office of that individual banking system for collection. Such branch offices may keep such books as may be necessary or proper in the conduct of their business.

Miss. Code Ann. § 81-7-7 (1972) provided as follows:

Territorial limitations.

Branch banks may be established within a radius of one hundred miles of the parent bank, but no parent bank shall be permitted to establish more than fifteen branch banks; and no parent bank shall be permitted to establish a branch bank in any town or city of less than 3,100 population according to the last preceding federal census where such town or city has one or more banks in operation.

The relevant portions of Miss. Code Ann. § 81-7-7 (Supp. 1986), provide as follows:

Establishment of branch banks de novo or by merger or consolidation.

(1) For purposes of this section and Section 81-7-8, "branch bank de novo" or "branching de novo" refers to a branch established by the opening of

a new branch bank and includes a branch bank or branch office acquired from another bank without acquiring substantially all of the assets of the other bank.

(2) Subject to the restrictions contained in Section 81-7-8, a bank may establish:

(a) Branch banks de novo within the applicable radius from the parent bank, as specified in subsection (5) of this section, subject to compliance with the procedures set forth in Section 81-7-1;

. . . .

(5) For the purposes of this section, the applicable radius from the parent bank shall be:

(a) One hundred (100) miles, from July 1, 1986, through June 30, 1987;

(b) One hundred fifty (150) miles, from July 1, 1987, through June 30, 1988;

(c) Two hundred (200) miles, from July 1, 1988, through June 30, 1989;

(d) The geographical boundaries of the State of Mississippi, from and after July 1, 1989.

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No. 86-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX

TABLE OF CONTENTS

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, TO ESTABLISH A BRANCH OFFICE IN GULFPORT, MISSISSIPPI

I. BACKGROUND

By application dated September 10, 1984, Deposit Guaranty National Bank ("DGNB") has applied to establish a branch in Gulfport, Mississippi. DGNB's main office is located in Jackson, Mississippi. The proposed branch would be more than 100 miles from that main office.

The National Bank Act provides that:

> [a] national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. § 36(c).

Section 36 further provides that:

> [t]he words "State bank," "State banks," "bank" or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. § 36(h).

Mississippi law provides that branch banks may be established by state-chartered commercial banks within a radius of 100 miles of the parent bank. Miss. Code of

1972, Ann., § 81-7-7. On the other hand, Mississippi-chartered savings associations are authorized to branch without a territorial limitation and may, thus, branch statewide. Miss. Code of 1972, Ann., § 81-12-175.

The application states that the requirements of 12 U.S.C. § 36 are met because Mississippi savings associations are carrying on the business of banking under state laws and are, thus, "State banks" for purposes of section 36. Since Mississippi savings associations may branch statewide, the applicant concludes that national banks in Mississippi may do likewise. As to other applicable Mississippi law, the application states it meets the statutory requirements as to name (§ 81-7-3, Miss. Code of 1972, Ann.) and paid-in, unimpaired capital (§ 81-7-9, Miss. Code of 1972, Ann.).

Fourteen comments, most of them protesting the legality of a national bank branch being established outside the 100 mile limit in section 81-7-7, Miss. Code of 1972, Ann., were received and acknowledged. The comment period ended on October 10, 1984.

II. OCC POLICY ON ESTABLISHMENT OF DOMESTIC BRANCHES

The regulation governing establishment and operation of domestic branches provides that the Office is guided by the following principles:

> The Office is responsible for maintaining a sound banking system; the Office is responsible for encouraging a bank to help meet the credit needs of its entire community; the marketplace is normally the best regulator of economic activity; and competition promotes a sound and more efficient banking system that serves customers well . . . . Accordingly, it is the general policy of the Office to approve applications to establish and operate branches . . . provided

> that the approval would not violate the provisions of applicable federal law or State law that is incorporated into federal law regarding the establishment of such branches . . . .

12 C.F.R. § 5.30(c).

The Office does, however, reserve the right to deny applications, or to grant approval subject to fulfillment of certain conditions, if:

> (i) There are significant supervisory concerns with respect to the applicant or any affiliated organization as defined by 12 U.S.C. 221a; or
>
> (ii) The applicant's record of helping to meet the credit needs of its entire community, including low and moderate income neighborhoods, consistent with the safe and sound operation of the bank, is less than satisfactory; or
>
> (iii) Any financial or other business arrangement, direct or indirect, involving the proposed branch . . . and bank insiders (directors, officers, employees, and shareholders owning or controlling directly or indirectly, 10 percent or more of any class of the subject bank's voting stock) involves terms and conditions more favorable to the insiders than would be available in a comparable transaction with unrelated parties.

12 C.F.R. § 5.30(c)(2).

After reviewing these factors in connection with the subject application, I find no reason to deny or condition approval of this application. Therefore, the establishment and operation of a branch by DGNB in Gulfport, Mississippi, is approved. As discussed below, I have found the approval to be consistent with applicable law.

III. LEGAL ISSUES

A. The language of secton 36 requires consideration of the branching powers of financial institutions other than state commercial banks.

The establishment and operation of branches by national banks is governed by 12 U.S.C. § 36, which was originally enacted in 1927 as part of the McFadden Act. As set out above, section 36(c) provides, briefly, that national banks may branch to the same extent as state banks in the state in which they are located. "State bank" is defined "to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." 12 U.S.C. § 36(h).

The definition on its face covers more than commercial banks, which are not specifically mentioned. Indeed, Congress apparently presumed that the mere use of the term "State bank" in the substantitive portions of section 36 was sufficiently clear with regard to commercial banks. The plain meaning of section 36(h) thus evidences its purpose—to ensure that state institutions, not necessarily defined by state law as "banks," but nonetheless carrying on the business of banking under authority of State laws, be included within the term "State bank." In other words, if Congress were only concerned with state commercial bank competition, then section 36(h) would apparently not have been enacted. It was, however, enacted and must, according to principles of statutory construction, be given meaning. *See* C. Sands, *Statutes and Statutory Construction* §§ 46.06, 47.28 and 47.37 (3d ed. 1975 and Supp. 1983).

The precise question is, therefore, whether Mississippi savings associations are "institutions carrying on the banking business under authority of State laws." The answer is a matter of federal, rather than state law.

B. Supreme Court case law supports application of a federal definition of "State bank."

The decisions of the U.S. Supreme Court, while not directly on point, do provide basic principles to be used in the interpretation of section 36 and do support the position that Congress intended that section 36(h), rather than state law definitions, determine which financial institutions are "State banks" for purposes of section 36(c). In *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966), the Court addressed the issue of whether national banks could establish branches through means other than acquisition in localities where, under Utah law, state-chartered banks could establish branches only through acquisitions of banks which had been in existence over five years. The national banks argued that the state-law restrictions went merely to the "method" of branching, not to "whether" or "where" branches could be established and, thus, were not made applicable to national banks by section 36(c).

In the course of deciding to reject the bank's argument, the Court reviewed the legislative history and purposes of section 36, concluding that the policy of competitive equality is the guiding principle in its interpretation. The Court stated that:

> It appears clear from [the Court's] resume of the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of "competitive equality" insofar as branch banking was concerned. Both sponsors of the apppplicable banking Acts, Representative McFadden and Senator Glass, so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear-cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption . . . .

First National Bank of Logan, supra, at 261. *See Independent Bankers Association v. Smith*, 534 F.2d 921

(D.C. Cir. 1976) (policy of competitive equality manifests Congressional concern that neither the state bank system nor the national bank system was to have advantage over the other under section 36).

In light of this overriding legislative concern for competitive equality, the Supreme Court in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), for the first time addressed the interpretation of a definitional provision of section 36. The Court examined the definition of "branch" contained in 12 U.S.C. § 36(f) and found it to include two off-premises bank services (armored car service and secured receptacle for receipt of monies). Most significantly for our purposes, the Court clearly stated that the defintion of "branch" in section 36(f) is a matter of federal law, reasoning that:

> The policy of competitive equality is therefore firmly embedded in the statute governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation. We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what constitutes "branch banking" must control the content of the federal definition of § 36(f). Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated, *Walker Bank, supra*, for in § 36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation

> of state law to the problem, since the threshold question is to be determined as a matter of federal law. . . . In short, the definition of "branch" in § 36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra.*

396 U.S. at 133-34 (footnote omitted).

Just as in *Plant City*, protestants of the DGNB application urge that state law definitions of "bank" control. *See* Opinion Letter of Jones, Day, Reavis & Pogue (Oct. 18, 1984) ("Jones, Day letter") 7-13. I believe that the underlying reasoning of the Court in *Plant City* should likewise apply here. In holding that the definition of "branch" is a federal determination, the Court in *Plant City* sought to avoid the resulting competitive advantage which would have inured to state banks had the Court concluded that it is a matter of state law. If the *Plant City* Court had not determined that the interpretation of § 36(f) is exclusively a matter of federal law, the states could have disadvantaged national banks on matters not having the competitive effect of branching, through the expedient of labeling such matters "branching." Likewise, the concept of competitive equality requires a federal definition of "State bank" to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions "banks" and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks.[1] Hence, for purposes of competitive equality, it is the federal definition of § 36(h) which controls.

It is also significant that the *Plant City* Court urged that, based on a policy of competitive equality, the definition of "branch" must not be read restrictively. 396 U.S.

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[1] Griffin, *Branching By National Banks: Must The "(h)" Always Be Silent?*, 3 Journal of Law and Commerce, 243, 246 (1983).

at 134. Protestants here, on the other hand, appear to believe that section 36(h) should be given a very narrow reading, one which would give limited effect to the general phrase "other such institutions or corporations carrying on the banking business under the authority of State laws." That phrase is, indeed, more open-ended than section 36(f)'s list of branching functions and suggests that section 36(h) was intended by Congress to include more than the specified types of financial institutions. Thus, if state institutions other than commercial banks, savings banks and trust companies are carrying on the banking business under authority of state laws, they should be treated as state banks for purposes of section 36.

C. Lower federal court decisions do not establish reliable precedents.

Protestants submit that the decisions of certain lower federal courts have otherwise limited the scope of section 36(h). Primarily, they rely upon *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979).[2] In *Mutschler*, the Ninth Circuit held that a national bank in the state of Washington could not branch to the extent allowed Washington savings banks. The Court concluded that only the state law concerning the limits on the branching powers of state commercial banks was incorporated by section 36 to determine the branching powers of national banks. In so doing, the Court relied squarely on the precedent established in *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash. 1966), thirteen years earlier. Strangely, *Mut-*

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[2] Protestants also relied upon *First National Bank and Trust Company of Okmulgee v. Empie*, (No. 79-296-G, E.D. Okla. 1982), which followed the precedent established in *Mutschler*. *See infra.* Distribution Listfinancial institutions engaged in the business of banking.

schler does not even consider the possible impact of the intervening *Plant City* decision of the Supreme Court nor does it accord appropriate significance to the Congressional purpose embodied in section 36(h).

As discussed above, the Supreme Court in *Plant City* found that the definition of "branch" in section 36(f) is a matter of federal law and urged a broad reading of that term in order to ensure competitive equality as envisioned by Congress. Similarly, a broad definition of "State bank" would permit national banks to have branching powers which are coextensive with the most liberal branching powers granted to state financial institutions engaged in the business of banking. Such an approach allows a state, consistent with the underlying Congressional intent, to determine the extent to which branching is permissible within its borders, while preventing states from establishing a class of financial institutions competing with national banks for banking business which has a competitive advantage over national banks with regard to branching.

As noted above, *Mutschler* essentially reads section 36(h) out of section 36 by holding that "State bank" means only state *commercial* bank. The court instead relied on the language of section 36(c) in its holding, ignoring section 36(h). Specifically, the court reasoned that:

> Since § 36(c) requires that branching will be permitted only if expressly authorized by State statute law, an applicant wishing to branch under RCW 32.04.030 [governing branching by mutual savings banks] must satisfy all the provisions of that statute and show that it engages itself exclusively as a mutual savings bank. *State Chartered Banks v. Peoples National Bank.* Since Peoples National Bank, as a commercial bank, fails in certain particulars to satisfy all the requirements established in RCW 32.04.030 for the branching of a mutual savings bank, its application cannot be judged under

> that statute, but must, instead, be judged under RCW 30.40.020 [governing branching by state commercial banks].
>
> 607 F.2d at 279 (citation omitted).

There are several aspects of the court's reasoning that do not withstand close scrutiny. Under the *Mutschler* rationale, national banks must engage themselves "exclusively" as one type of state financial institution and satisfy all the particulars of the statute authorizing such institutions to branch. Such a restriction is not found in section 36(h), which on its face envisions that more than one type of financial institution may be considered a "State bank" for purposes of section 36, including "savings banks." The Ninth Circuit's circular logic (national banks are commercial banks and, thus, may only branch to the extent of state commercial banks) not only ignores the plain meaning of section 36(h), but evidences a misunderstanding of the scheme contemplated by Congress at the time of its enactment.

Clearly, it was not deemed necessary by Congress that national banks actually must limit themselves exclusively to the activities authorized to savings banks or trust companies in order to enjoy branching privileges similar to those institutions in states where such state-chartered institutions were allowed to branch. Had Congress intended that only state commercial bank statutes be used to measure the branching powers of national banks, section 36(h) would not have been necessary. Indeed, section 36(h) does not even specifically mention commercial banks. Its enumeration of other entities carrying on the banking business under the authority of state laws must be treated as significant. *Mutschler* failed to do so. Instead, the court relied on the *Peoples National Bank* case, *supra*, which in light of the subsequent *Plant City* case, *supra*, had accorded undue weight to state law requirements. Because of the flaws in its rationale, I do

not believe that *Mutschler* should be considered as a controlling precedent.

A more recent Tenth Circuit decision, *First National Bank and Trust Co. of Okmulgee v. Empie*, No. 78-296-C (E.D. Okla. 1982), *appeal dismissed*, No. 83-1071 (10th Cir. July 18, 1983), is flawed by its heavy reliance on *Mutschler*. In that case, the Comptroller and the national bank had argued that Oklahoma trust companies carry on "banking business under the authority of State laws" and were, therefore, "State banks" within the meaning of section 36(h).

The district court rejected this argument, saying that it was:

> unable to distinguish [*Mutschler*] from the case at bar. Trust companies in the State of Oklahoma are in the identical position as savings banks are in the State of Washington. They are separate and distinct creations from State banks. Hence, under the authority of that case, nationally-chartered banks in Oklahoma cannot branch in Oklahoma if Oklahoma state-chartered banks are prohibited from doing so . . . .

Slip. Op. at 8.

The *Okmulgee* court's rationale, thus, suffers from the same basic flaws as does *Mutschler*. It should be noted, however, that *Okmulgee* does go further in explaining why Oklahoma trust companies do not engage in the "banking business under the authority of State laws." The court states that, by law, trust companies "have never been permitted to engage in the banking business in Oklahoma." *Id.* at 8-9 n.4. To the extent that the court is merely allowing the state to define "banking business" and, thereby, "State bank," the defect in this approach has already been addressed. It is also possible to view the case as distinguishable to the extent that

Oklahoma trust companies are not authorized and do not functionally engage in the banking business. This is a reasonable interpretation due to the limited nature of the business of Oklahoma trust companies.

D. The legislative history of section 36 does not support the interpretation urged by protestants.

The *Walker Bank* case, *supra*, contains a thorough discussion of the legislative history of section 36 which need not be revisited here. Certain points concerning the legislative history raised by protestants (*see* Jones, Day letter, *supra*, at 13-14) will be addressed, however.

First, the Jones, Day letter cites a statement made by Representative McFadden that the act would result in competitive equality "among all member banks of the Federal Reserve System." 69 Cong. Rec. 5815 (1927). This statement is offered in support of the proposition that section 36(h)'s definition of "State bank" was intended to include only those financial institutions eligible for membership in the Federal Reserve System. Reliance on Representative McFadden's statement overlooks the fact that section 36, as we know it, is a result of both the McFadden Act and the Banking Act of 1933. The McFadden Act provided that, in the states that allowed state-wide branching by state-chartered institutions, national banks and state member banks were only allowed to branch within their home municipalities. Thus, the effect of the McFadden Act was limited, as indicated by Representative McFadden's statement, to achieving competitive equality among members of the Federal Reserve System. The scope of section 36 was, however, expanded under the Banking Act of 1933 by the inclusion of all state banks, whether or not members of the Federal Reserve System. In light of this context, Representative McFadden's statement offers no insight into the basic question of the definition of "State bank" for purposes of determinig branching authority.

Protestants also point to the lack of references to savings and loan associations in the legislative history relating to the branching issue. They suggest that this means that, since Congress must have been aware of the existence of such institutions and the statutes governing them and since other institutions, such as savings banks, were specifically addressed, Congress must have intended that savings and loan institutions not be included in section 36(h). This interpretation ignores the general language of section 36(h), which must, under all accepted rules of statutory construction, be given effect. *See* C. Sands, *Statutes and Statutory Construction* §§ 46.06, 47.28 and 47.37 (3d ed. 1975 and Supp. 1983). As we have stated, the actual issue is the meaning of "other such corporations or institutions carrying on the banking business under the authority of State laws." We do not suggest that in 1927 savings and loan associations were carrying on the banking business. This alone would explain the lack of discussion of such institutions in the legislative history. Protestants further suggest that savings banks were included because they were called "banks." It is interesting to note that a number of Mississippi savings associations are converting to savings banks or are changing their names to include the term "bank", presumably in recognition of their expanded powers and the current public perception of their bank-like functions. *See* Submission of Golembe Associates, Inc., Exhibit B ("Other [Mississippi] savings and loan associations have changed their name to incorporate the word bank to reflect [their] expanding financial services.").

E. Mississippi savings associations should be deemed "State banks" under 12 U.S.C. § 36(h), if they are authorized under State law, to engage in the "banking business" and are carrying on the banking business.

Mississippi savings associations should be considered "State banks" under section 36(h) if they are "corporations or institutions carrying on the banking business

under the authority of State laws." For the reasons discussed above, this issue must be analyzed as a matter of federal law, on a functional basis, always keeping in mind the competitive equality purpose behind the statute.

The first step in this analysis is determining what is meant by the term "banking business" for purposes of section 36(h). There does not appear to be any clear, universally-accepted definition of what constitutes the business of banking. One definition may be derived from the enumerated powers of national banks contained in the National Bank Act:

(1) the discounting and negotiating of promissory notes, drafts, bills of exchange, and other evidences of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

12 U.S.C. § 24(Seventh).

The fifth item is no longer relevant since only Federal Reserve Banks now issue notes used as currency. Also, item 3 is of little relevance since it is not an important part of the business of commercial banks generally and is an activity engaged in by only a relatively small number of commercial banks. The remaining three items (1, 2, and 4) do provide the basis for defining the business of banking. Thus, the National Bank Act essentially reduces the business of banking, in perhaps its simplest form, to accepting deposits, making loans, and paying checks. This is, interestingly, the same definition found in section 36(f)'s definition of "branch," by which Congress meant to identify the core banking functions which may only be conducted at authorized branch locations.

The U.S. Supreme Court's analysis in bank merger antitrust cases is also helpful in delineating the parameters of the business of banking, since similar competitive considerations are applicable to the operation of section 36 (h).[3] These cases have described the banking business as a cluster of products and services. For example, in *U.S. v. Philadelphia National Bank*, 374 U.S. 321 (1963), the Court stated that among this cluster of banking products and services:

> the creation of additional money and credit, the management of the checking system, and the furnishing of short-term business loans would appear to be the most important.

344 U.S. at 326-7.[4]

It is further enlightening to view the increasing overlap of services between commercial banks and thrift institutions in the context of recent developments in the antitrust concept of the business of banking. Initially, thrift institutions were held not within the relevant line of commerce and were not considered in the evaluation of the competitive effects of bank mergers. In *U.S. v. First National State Bancorporation*, 499 F. Supp. 793 (D.N.J. 1980), the court still refused to expand the relevant line of commerce to include thrifts. The court's functional approach, however, left open the possibility that future analysis could lead to a different result, stressing that, in

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[3] The reference to these antitrust cases is intended to provide a useful analogy. Such reference is not a suggestion by this Office that they offer a conclusive definition of commercial banking or that banks, particularly national banks, must offer all of the products or services included within the relevant line of commerce under those cases.

[4] *See also, e.g., U.S. v. Connecticut National Bank*, 418 U.S. 656, 663 (1974); *U.S. v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 359-62 (1970); *U.S. v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 667 (1964).

1980, commercial banks were the only financial institutions able to offer an "entire menu" of financial services.

Most recent decisions of this Office and the Federal Reserve Board have found in the expanded powers of thrifts since the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Garn-St Germain Depository Institutions Act of 1982 significant erosion of commercial banking as a separate line of commerce. *See, e.g., First Tennessee National Corporation*, 69 Fed. Res. Bull. 299 (Mar. 31, 1983) (thrifts have, or have the potential to, become "major competitors" of banks); *Decision of the Comptroller on the Application to Merge the Connecticut Bank and Trust Company, Hartford, Connecticut, into the State National Bank of Connecticut, Bridgeport, Connecticut, under the Charter of the Latter and the Title of "Connecticut Bank and Trust Company"* (Dec. 1, 1982) (thrifts considered in competitive analysis). *See also*, Sayers, *Bank Expansion and Probable Future Competition*, 102 Banking L.J. 100 (1985); Vartanian, *Potential Competition and Bank Mergers: Defense Blueprint for the 1980's*, 99 Banking Law Journal 882, 901 (1982) ("The 1980 Act makes clear the congressional intent that thrift institutions and commercial banks be placed in a position of competitive parity").

The next component of the analysis involves determining the authority of Mississippi savings associations to engage in the business of banking under state laws. The expanded powers of thrift institutions which resulted from those recent legislative changes that have previously been referred to, as well as changes enacted by the state legislature, constitute an "entire menu" of financial services, including the essential functions of accepting deposits, making loans and paying checks (or their functional equivalents, negotiable orders of withdrawal). Specifically, Mississippi savings associations are empowered, *inter alia*, to:

- Accept savings accounts [deposits] (Miss. Code of 1972, Ann. § 81-12-49(d));
- Pay interest on deposits and other accounts (Miss. Code of 1972, Ann. § 81-12-49(d));
- Act in a fiduciary capacity for customers (Miss. Code of 1972, Ann. § 81-12-49(o));
- Offer NOW Accounts (Miss. Code of 1972, Ann. § 81-12-149; § 81-12-151);
- Service loans and investments for others (Miss. Code of 1972, Ann. § 81-12-49(n));
- Pay earnings on savings accounts (Miss. Code of 1972, Ann. § 81-12-149);
- To sell money orders, travelers checks or similar instruments (Miss. Code of 1972, Ann. § 81-12-49(l));
- To lend and invest funds (Miss. Code of 1972, Ann. § 81-12-49(p));
- Allow withdrawal of all or any part of savings accounts upon written request (Miss. Code of 1972, Ann. § 81-12-151); and
- To purchase, sell, lease or mortgage personal or real property (Miss. Code of 1972, Ann. § 81-12-49(c)).

In addition to the above powers, Mississippi savings associations "possess such of the rights, powers, privileges, immunities, duties and obligations of federal savings and loan associations." Miss. Code of 1972, Ann., § 81-12-49(r). Following the enactment of the Garn-St Germain Act, Pub. L. No. 97-320, federally-chartered savings and loans may, *inter alia*,

- Offer demand deposits to businesses that have, at some time, had a loan relationship with the savings and loan (12 U.S.C. § 1464(b)(1));

- Make commercial loans of up to 5% of assets before January 1, 1984, and of up to 10% of assets after that date (12 U.S.C. § 1464(c)(1)(R); and
- Make investments in tangible personal property of up to 10% of assets for purposes of rental or sale (12 U.S.C. § 1464(c)(2)(A).

In light of the above statutory authority, it is apparent that Mississippi-chartered savings associations are not institutions whose powers are limited to providing mortgage credit, as savings and loan associations were traditionally restricted. Rather, they are institutions which are permitted to offer a broad range of financial services and products. Among the products and services which may be offered by Mississippi savings associations are those which, as discussed earlier, appear to be essential to the banking business, *i.e.*, the accepting of demand deposits, the making of commercial and other non-mortgage loans and the accepting of time and savings deposits. These powers enable Mississippi savings associations to perform essentially the same functions and services that are provided by commercial banks.

In determining whether Mississippi savings associations are carrying on the business of banking, the final stage of our analysis, we must look to the record developed in connection with this application, chiefly the submission of Golembe Associates, Inc. (Sept. 6, 1984) ("Golembe Report"). DGNB retained Golembe Associates, Inc. to conduct an independent study into "whether Mississippi's state-chartered savings and loan associations should be classified as state banks for purposes of the McFadden Act restrictions on national bank branching." Golembe Report, Preface. During July and August of 1984, Golembe Associates conducted interviews with senior executives at a half-dozen of Mississippi's larger savings institutions and reviewed financial data and other publicly available information on federally-and state-chartered as-

sociations throughout the state. In its conclusion, that Mississippi savings associations are state banks for purposes of the McFadden Act, Golembe Associates drew on its study, as well as "its general knowledge of the banking industry." *Id.* Also included in the record is the Declaration of John P. Danforth ("Danforth Declaration"), a Senior Associate at Golembe Associates, who had primary responsibility for the preparation of the Golembe Report. In his statement, Mr. Danforth discussed certain additional data, including the results of two surveys completed after submission of the report.

The Golembe Report, as supplemented by the Danforth Declaration, concludes that Mississippi savings associations are carrying on the business of banking. Briefly, Golembe Associates found that Mississippi associations are currently offering a range of products and services in competition with commercial banks, including NOW accounts, auto and other consumer loans, construction loans, and commercial loans. *See* Danforth Declaration, Exhibit C. Furthermore, Mississippi savings associations have been actively marketing such products and services, often referring to them as "banking" products and services or to themselves as "banks." *See* Golembe Report, Exhibits C, D and E.

The Golembe submissions also provide certain quantifiable data. The report contains figures which indicate that, in the consumer banking area, Mississippi savings associations are more active than are all FSLIC insured savings and loan associations generally. For example, while the national group has only 3.5% of its deposits in transaction accounts, Mississippi associations had 12.2% of their deposits in such accounts, indicating success in marketing checking services, according to the report. Also, a telephone survey of 300 households in the Jackson, Mississippi area found that 82 of those households obtained some of their banking services from Mississippi savings associations, with 21 of 300 households having

their primary checking needs met by a savings association. Danforth Declaration at 3.

Based on the foregoing, it is clear that Mississippi-chartered savings associations now offer a range of products and services that constitute the "business of banking." Due to the relatively recent expansion of the authority to engage in certain of those activities, the level of activity is not fully quantified in the record. The language of 12 U.S.C. § 36 does not, however, require a showing of a specific level of competitive impact. Mississippi savings associations are, in fact, carrying on the business of banking under authority of state laws. Thus, I conclude that Mississippi savings associations are "State banks," as defined in section 36(h).

V. CONCLUSION

Since I have determined that Mississippi savings associations are authorized to carry on the business of banking under state laws and are carrying on that business, such associations are "State banks" for purposes of 12 U.S.C. § 36(h). National banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide. Therefore, because it conforms to the policies of this Office and is consistent with applicable law, this application is approved.

/s/ Michael A. Mancusi
MICHAEL A. MANCUSI
Senior Deputy Comptroller
for National Operations

July 9, 1985
Date

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

Civ. A. No. J85-0698(L)

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Plaintiff,

GULF NATIONAL BANK, MERCHANTS BANK & TRUST COMPANY, HANCOCK BANK, PEOPLES BANK OF BILOXI, BANK OF WIGGINS, THE PEOPLES BANK & TRUST COMPANY, AND BANK OF MISSISSIPPI,
Plaintiffs-Intervenors,

v.

JOE SELBY, ACTING COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and DEPOSIT GUARANTY NATIONAL BANK,
Defendants.

Aug. 27, 1985

Edwin Lloyd Pittman, Robert Arentson, Stephen J. Kirchmayr, Office of the Attorney General, Hubbard T. Saunders, Champ Terney, Donald Clark, Jr., Crosthwait, Terney & Noble, Jackson, Miss., for the Department.

G.E. Estes, Jr., Estes & Estes, Gulfport, Miss., for Merchants Bank & Trust.

John M. Harral, White & Morse, Gulfport, Miss., for Hancock, Bank of Wiggins, Peoples, Peoples Bank & Trust and Bank of Mississippi.

W. Joel Blass, Mize, Thompson & Blass, Gulfport, Miss., for Gulf National Bank.

Frank A. Riley, Riley, Weir & Caldwell, Tupelo, Miss., for Bank of MS, Tupelo.

George Phillips (Danny McDaniel), U.S. Atty., Jackson, Miss., David H. White, U.S. Atty., Dept. of Justice, Mark Leemon, Office of Comptroller of the Currency, Washington, D.C., for Comptroller.

Robert C. Cannada, Lawrence J. Franck, Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss., for Deposit Guaranty.

MEMORANDUM OPINION

TOM S. LEE, District Judge.

Deposit Guaranty National Bank (DGNB) is a federally chartered banking association with its principal office in Jackson, Mississippi. DGNB applied to the Comptroller of the Currency of the United States (Comptroller) for permission to establish a branch office in Gulfport, Mississippi, which is approximately 170 miles from Jackson. On July 9, 1985, following review of DGNB's application and comments submitted by various parties, the Comptroller approved the application. The Department of Banking and Consumer Finance of the State of Mississippi (Department), an agency of the State of Mississippi charged with the responsibility of administering all laws relating to corporations carrying on the banking business in the state,[1] advised the Comptroller during the comment period that approval of the proposed branch would violate Mississippi law. Following approval of the application, the Department brought this action

[1] Miss.Code Ann. § 81-1-59 (Supp. 1984).

against DGNB and Joe Selby, Acting Comptroller of the Currency of the United States, to enjoin opening of the branch and, following briefing and argument, the court granted the Department's motion for a temporary restraining order. By agreed order, the parties have treated the temporary restraining order as a preliminary injunction pending an expedited briefing schedule and hearing on the merits of the case pursuant to Federal Rule of Civil Procedure 65. Gulf National Bank, Merchants Bank & Trust Company, Hancock Bank, Peoples Bank of Biloxi, Bank of Wiggins, The Peoples Bank & Trust Company and Bank of Mississippi were allowed to intervene as plaintiffs.[2] The parties extensively briefed the issues and the court heard argument August 20, 1985.

The McFadden Act provides in part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency. establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * * * *
>
> (h) The words "State bank" "State banks," "bank" or "banks," as used in the section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. § 36.

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[2] Use of the word "plaintiffs" hereinafter refers to plaintiff Department and plaintiff-intervenors.

In Mississippi, a state-chartered commercial bank may operate branch banks in the county where its principal office is located, in any county adjacent to the county in which its principal office is located or within a 100-mile radius of the bank's principal office. Miss.Code Ann. §§ 81-7-5 & -7 (1972). Mississippi savings associations, however, may branch statewide. Miss.Code Ann. § 81-12-175 (Supp.1984). The Comptroller determined, based on cases and statutes defining the business of banking in other contexts and a study of the banking industry in Mississippi submitted by DGNB, that savings associations in Mississippi are engaged in the business of banking and are, therefore, "State banks" as defined in § 36(h). The Comptroller concluded that "[n]ational banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide." Decision of Comptroller at 31.

The scope of this court's review of the Comptroller's decision is governed by 5 U.S.C. § 706 which provides in part:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

See Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). Only questions of fact are subject to the "arbitrary and capricious" standard; "questions of law . . . are freely reviewable by the courts." *Coca-Cola Co. v. Atchison, Top. & S.F. Ry. Co.*, 608 F.2d 213, 218 (5th Cir.1979). Review is further limited to the administrative record made in the proceedings before the Comptroller. *Camp v. Pitts*, 411 U.S. at 142, 93 S.Ct. at 1244.

The Comptroller's decision involves questions of law regarding construction of the controlling statute and questions of fact regarding the Comptroller's determination that Mississippi savings associations carry on the banking business. Because this court concludes that the Comptroller's construction of § 36(h) is not in accordance with law, consideration of his factual findings is unnecessary.

Defendants contend that the Comptroller's interpretation of § 36(h) is in accordance with law. The § 36(h) definition, according to the defendants, is a functional one, to be applied by determining what entities carry on the business of banking; reference in § 36(h) to the "authority of state laws" is intended only to distinguish state from national banks and not to impose a state law definition of the banking business. Defendants rely on *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein the United States Supreme Court stated that federal law governs the § 36(f) definition of "branch"[3] since the use of state law definition in that regard would allow the states to be "the sole judges of their own powers" under the McFadden Act. *Id.* at 133, 90 S.Ct. at 343.

Plaintiffs argue that § 36(h) includes as state banks only those entities which are expressly chartered to carry on the banking business by state law. Section 81-3-3 of the Mississippi Code Annotated provides in part:

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[3] 12 U.S.C. § 36(f) provides:

> (f) the term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Plaintiffs note that § 36(f) contains no reference to state law whereas § 36(h) does.

> Every corporation organized under the laws of this state for the purpose of conducting or carrying on a commercial banking business, or the business of a savings bank, or trust company, or the exercise of trust powers as defined in this title, or any combination thereof, shall be subject to supervision by the department of bank supervision and the state comptroller, and to assessments for the maintenance of said department as provided by law.

State-chartered savings associations are not under the supervision of the Department and, according to plaintiffs, are, therefore, not "State banks" within the meaning of § 36(h).

While plaintiffs' construction of the statute is not entirely persuasive, the court concludes that the legislative history of the McFadden Act and policy considerations weigh heavily in their favor.[4]

In *First National Bank v. Walker Bank & Trust Company*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), the United States Supreme Court examined the legislative history of the McFadden Act. In 1923, apparently due to a substantial increase in the number of branch banks, the Comptroller recommended congressional action on branch banking. Action was not taken, however, until 1927 with the adoption of the McFadden Act. *Walker Bank*, 385 U.S. at 258, 87 S.Ct. at 495. The sponsor of the bill, Representative McFadden, stated at the time of enactment:

> As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been estab-

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[4] Review of legislative history and public policy is helpful in cases of statutory construction. *See, e.g.*, Sutherland Stat.Constrn. §§ 45.05, 45.06 & 45.09 (4th ed.).

> lished among all member banks of the Federal reserve system. 68 Cong.Rec. 5815 (1927).

Walker Bank, 385 U.S. at 258, 87 S.Ct. at 495. The 1927 bill allowed national banks to branch in cities where state banks were allowed by state law to do so and limited state bank members of the Federal Reserve system to "inside" branches.[5] *Id.* In 1931, a bill to allow national banks to branch irrespective of state law was introduced. It met strenuous opposition and was eventually defeated. *Id.* at 259, 87 S.Ct. at 496. The Banking Act of 1933 abolished the limitation on state banks included in the 1927 Act and, as Senator Glass stated on the Senate floor, "[permitted national banks to branch] only in those States and to the extent that the State laws permitted branch banking." *Walker Bank*, 385 U.S. at 259, 87 S.Ct. at 496 (quoting 76 Cong.Rec. 2511 (1933)). The *Walker Bank* Court concluded that "Congress intended to place national and state banks on the basis of 'competitive equality' insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261, 87 S.Ct. at 497.

In *First National Bank of Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), the Comptroller had approved a national bank's application to provide armored car services and to establish an off-premises depository. The Florida Banking Commissioner notified the bank that those services violated Florida law which restricted the business of banking to the main banking facility. The United States Supreme Court stated:

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[5] The legislative history and the Act itself are devoid of specific reference to savings and loan associations. Reference was made during debates, however, to the fact that national banks in Missouri would have limited branching power because Missouri imposed such restrictions on state commercial banks. 66 Cong.Rec. 1568 and 1764 (1925). At that time Missouri authorized more extensive branching by savings and loan associations. *See* Laws of Mo., 1925, p. 152.

> Here we are confronted by a systematic attempt to secure for national banks branching privileges which Florida denies to competing state banks. The utility of the armored car service and deposit receptacle are obvious; many States permit state chartered banks to use this eminently sensible mode of operations, but Florida's policy is not open to judicial review any more than is the congressional policy of "competitive equality." Nor is the congressional policy of competitive equality with its deference to state standards open to modification by the Comptroller of the Currency.

Id. at 138, 90 S.Ct. at 345.

The Comptroller's decision before this court reflects a similar attempt to obtain for national banks a competitive advantage.[6] Mississippi legislation allowing state savings associations greater branching privileges than those of state commercial banks reflects state policy considerations which are not subject to modification by the Comptroller or by this court.[7] That is a responsibility which rests with the Mississippi legislature or with Congress.[8] Certainly there are differences in the ability of

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[6] In *Plant City*, the Comptroller had determined that the services offered by the bank were not branches within the § 36(f) definition and, therefore, not subject to the state law prohibition. Defendants rely on *Plant City* contending that it holds that federal law and not state law is to be used to define "branch," a proposition to which all litigants in the case agreed. *See id.* at 134, n. 7, To determine whether, under federal law, the services offered constituted a branch, the court looked not only to the language of the statute, but also to the statutory purpose of mainaining competitive equality. *See id.* at 136, 90 S.Ct. at 344.

[7] The branching provisions relevant to commercial banks and savings associations are parts of a legislative scheme devised by the Mississippi legislature to insure that both types of institutions will provide the best service to Mississippi consumers.

[8] DGNB initially approached the Mississippi legislature to advocate changes in the state's branching laws. The legislature apparently decided that the proposed changes were not in the best interest of the state.

commercial banks and savings associations to branch in Mississippi; savings associations may branch statewide whereas commercial banks, state and national, are limited geographically.[9] The Comptroller's decision, however, does not abolish these differences; it merely adjusts the situation so that national commercial banks may branch statewide, leaving only state banks subject to the state law limitations. Defendants contend that any inequality between state and national commercial banks which may be created by the Comptroller's decision could be quickly remedied by Mississippi Code Annotated § 81-5-1(10), which allows state banks to operate branches wherever national banks are allowed to do so. Assuming that defendants are correct in their interpretation of Mississippi law,[10] forcing a state to make such a change is clearly not in furtherance of the purpose of the McFadden Act.[11] The McFadden Act and its legislative history, according to the defendants, reflect a continuing intent to increase the powers of national banks. The McFadden Act, however, actually is intended to preserve a dual banking system,[12] an intent which obviously

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[9] It should be noted that Congress likewise has established different branching powers for national banks and federal savings and loan associations. Whereas the McFadden Act limits branching by national banks to the extent allowed state banks. The Federal Home Loan Bank Board may permit branching by federal savings and loan irrespective of state governing state savings and loans. *See Independent Bankers Ass'n v. FHLBB*, 557 F.Supp. 23, 26 (D.D.C. 1982).

[10] Even if defendants are not correct, it is arguable that, if DGNB were allowed to open its branch office in Gulfport, the Mississippi Legislature would be under pressure to enact legislation that would allow state banks to do the same.

[11] This is particularly true when the state's legislature has recently refused to make such a change.

[12] See *Plant City*, 385 U.S. at 131, 90 S.Ct. at 342. That defendants are not correct is reflected by the sound defeat of the 1931 bill which would have allowed national banks to branch irrespective

is not furthered by a decision of the Comptroller that would force a state to change state law in order to preserve its state banking system.[13]

The Comptroller is charged with enforcement of the Act, and for that reason, his decision is entitled to "considerable respect." [14] *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed.2d 22 (1980). In *Independent Bankers Association v. Marine Midland Bank*, 757 F.2d 453, 561 (2nd Cir.1985), the court considered a decision of the Comptroller which was in accord with his past rulings on which national banks and other parties had relied. Such is not the case here where the Comptroller's decision, while similar to past rulings, has never been upheld by a court. *See Mutschler v. Peoples National Bank*, 607 F.2d 274 (9th Cir. 1979); *Dakota National Bank & Trust Co. v. First National Bank & Trust Co.*, 554 F.2d 345 (8th Cir), *cert. denied*, 434 U.S. 877, 98 S.Ct. 229, 54 L.Ed.2d 157 (1977); *First National Bank & Trust Co. v. Empie*, No. 78-296-C (E.D.Okla., Nov. 15 & Dec. 17, 1982); *State Chartered Banks in Washington v. Peoples National Bank*, 291 F.Supp. 180 (W.D.Wash.1966).[15] Hence the

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of state law. Additionally, the *Walker Bank* Court began its discussion of the background of the National Bank Act by stating: "There has long been opposition to the exercise of federal power in the banking field." *Walker Bank*, 385 U.S. at 256, 87 S.Ct. at 495.

[13] Mississippi's state commercial banking system would be jeopardized in that state commercial banks would be prompted to convert their charters to enable them to compete in the commercial banking market.

[14] *But see Plant City*, 385 U.S. at 138, n. 11, 90 S.Ct. at 345, n. 11 (statements regarding Comptroller's attempts to allow national banks to branch beyond limits of state law).

[15] This court is of the opinion that the substantive analyses utilized in these cases is not controlling for each case fails to address directly the question in issue here. In addition to showing that the Comptroller's position has been rejected by every court

reliance interest found to be significant in *Marine Midland* is not a factor to be considered here.

This court is, accordingly, of the opinion that the Comptroller's decision is not in accordance with law and cannot be upheld. It is, therefore, ordered that defendant Comptroller is prohibited from issuing a certificate of authority authorizing DGNB to establish and operate a branch banking office in Gulfport, Mississippi and defendant DGNB is prohibited from establishing and operating a branch banking office in Gulfport, Mississippi.

Plaintiffs shall prepare a judgment pursuant to the local rules and submit to defendants for approval as to form.

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that has considered it, the cases are relevant in that, following their dispositions, Congress has not taken any action to change the law through new legislation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J85-0698(L)

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Plaintiff,

GULF NATIONAL BANK, MERCHANTS BANK & TRUST COMPANY, HANCOCK BANK, PEOPLES BANK OF BILOXI, BANK OF WIGGINS, THE PEOPLES BANK & TRUST COMPANY, and BANK OF MISSISSIPPI,
Plaintiffs-Intervenors,

v.

JOE SELBY, ACTING COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
Defendants.

[Filed Sept. 16, 1985]

JUDGMENT

The civil action having been submitted pursuant to Fed. R. Civ. P. 65 and the agreement of the parties for decision by the court on the merits based upon the administrative record, pleadings, briefs, and the oral argument of counsel on August 20, 1985, and the court, having filed its Memorandum Opinion on the merits of this

case on August 28, 1985, and for the reasons stated therein,

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

1. That the Motion by Defendant Selby for Summary Judgment is hereby DENIED;

2. That the July 9, 1985, Decision of the Comptroller of the Currency on the Application of Deposit Guaranty National Bank, Jackson, Mississippi, to Establish a Branch Office in Gulfport, Mississippi, R. 2-31, is UNLAWFUL and, therefore, NULL and VOID and is hereby VACATED and SET ASIDE;

3. That Defendant H. Joe Selby, in his official capacity as Acting Comptroller of the Currency, his successors in office, agents, servants, employees, attorneys, and all those persons acting in active concert or participation with them are hereby permanently ENJOINED and PROHIBITED from taking any action which would authorize Deposit Guaranty National Bank to establish or operate a branch banking office in the City of Gulfport, Harrison County, Mississippi;

4. That Defendant Deposit Guaranty National Bank and its officers, directors, agents, servants, employees, attorneys, and all those persons acting in active concert or participation with them are hereby permanently ENJOINED and PROHIBITED from establishing or operating a branch banking office in the City of Gulfport, Harrison County, Mississippi; and

5. That all costs incurred in this action are hereby assessed against Defendants H. Joe Selby, in his official capacity as Acting Comptroller of the Currency, and Deposit Guaranty National Bank, jointly and severally.

SO ORDERED, ADJUDGED, AND DECREED, on this, the 9th day of September, 1985.

/s/ Tom S. Lee
United States District Judge

APPROVED AS TO FORM:

/s/ Stephen J. Kirchmayr
by HTS, IV †
Attorney for Plaintiff

/s/ Hubbard F. Saunders, IV
Attorney for Plaintiff

George L. Phillips
United States Attorney

By: /s/ Daniel M. McDaniel, Jr.
DANIEL M. MCDANIEL, JR.
Assistant United States Attorney
Attorney for Defendant
H. Joe Selby in his official capacity as Acting Comptroller of the Currency

/s/ John M. Harral
by HTS, IV *
Attorney for Plaintiff-Intervenors
Hancock Bank, Peoples Bank of Biloxi, Bank of Wiggins, The Peoples Bank & Trust Company, and Bank of Mississippi

/s/ W. Joel Blass
by HTS, IV *
Attorney for Plaintiff-Intervenor
Gulf National Bank

/s/ G. E. Estes, Jr.
by HTS, IV *
Attorney for Plaintiff-Intervenor
Merchants Bank & Trust Company

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* Per 9-5-85 telephone authorization.

† Per 9-6-85 telephone authorization.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-4722

THE DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI, *et al.*,
Plaintiffs-Appellees,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES and DEPOSIT GUARANTY NATIONAL BANK,
Defendants-Appellants.

Feb. 9, 1987

Anthony J. Steinmeyer, Appellate Staff, Civil Div., Dept. of Justice, Washington, D.C., Dan M. McDaniel, Jr., Asst. U.S. Atty., John F. Daly, Jackson, Miss., for Controller of Currency.

Luther T. Munford, Lawrence J. Franck, Jackson, Miss., for Deposit Guar. Bank

Hubbard T. Saunders, Stephen J. Kirchmayr, Jr., Robert M. Arentson, Jr., Champ Terney, Jackson, Miss., for Dept. of Banking.

G.E. Estes, Jr., Gulfport, Miss., for Merchants Bank.

John M. Harral, Knox White, Gulfport, Miss., for Hancock Bank, et al.

W. Joel Blass, Gulfport, Miss., for Gulf Nat'l. Bank.

Appeal from the United States District Court for the Southern District of Mississippi.

Before POLITZ, RANDALL, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

This appeal by the Comptroller of the Currency of the United States and Deposit Guaranty National Bank of Jackson, Mississippi, from a judgment enjoining the Comptroller and Deposit Guaranty from establishing a branch office in Gulfport, Mississippi, poses a sole question: did the Comptroller err in his interpretation of the term "State bank" as found in 12 U.S.C. § 36(h), when he granted approval of Deposit Guaranty's application to establish the branch? The district court concluded that the Comptroller had erred. We disagree and reverse.

Background

In September 1984 Deposit Guaranty, a national banking corporation chartered under the laws of the United States with its principal office in Jackson, Mississippi, applied to the Comptroller for permission to open a branch bank in Gulfport, Mississippi. Gulfport is more than 100 miles distant from Jackson. During the public comment period following the publication of notice of Deposit Guaranty's application, the Department of Banking and Consumer Finance of the State of Mississippi and several state-chartered commercial banks with offices in or near Gulfport protested. On July 9, 1985, the Comptroller rejected the protests and granted the requested approval. The Department of Banking promptly filed the instant action, seeking to enjoin the opening of the Gulfport branch. Several state commercial banks were allowed to intervene. After reviewing the record developed before the Comptroller, the district court granted the injunctive relief. Both the Comptroller and Deposit Guaranty timely appealed.

Like most states, the State of Mississippi has historically recognized and chartered two kinds of financial institutions, commercial banks and savings associations. The commercial banks are chartered under Miss.Code Ann. § 81-3-3 and are regulated by the Department of Banking. The savings associations are chartered under Miss.Code Ann §§ 81-12-25 to 81-12-43 and are under the authority of the Mississippi Department of Savings Associations, Miss.Code Ann. § 81-12-11. Originally the financial activities of the two institutions differed. In recent years, however, because of changes in state and federal law, the savings associations have become highly competitive with the state banks and other financial institutions, including national banks.

The traditional powers and functions of a bank, constituting the business of banking, are enumerated in the National Bank Act, 12 U.S.C. § 24 (seventh):

(1) the discounting and negotiating of promissory notes, drafts, bills of exchanges, and other evidence of debt;

(2) the receiving of deposits;

(3) the buying and selling of exchange, coin and bullion;

(4) the loaning of money on personal security; and

(5) the issuing and circulating of notes under the National Bank Act.

As is noted by the Comptroller and generally acknowledged, items (3) and (5) are of little relevance. Hence, the banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts.

Starting in 1980, Mississippi's statutes and regulations dramatically changed, conferring traditional banking powers upon Mississippi savings associations which are

now authorized to: offer negotiable order of withdrawal (NOW) accounts and interest-bearing checking accounts, Miss.Code Ann. §§ 81-12-149, 81-12-151; receive and pay interest on savings deposits and other accounts, Miss. Code Ann. § 81-12-49(d); lend and invest funds, Miss. Code Ann. §§ 81-12-49(p), 81-12-155, 81-12-159; service loans and investments, Miss.Code Ann. § 81-12-49(n); and sell money orders and travelers' checks, Miss.Code Ann. § 81-12-49(*l*). Under what is sometimes referred to as the "wild card" statute, Miss.Code Ann. § 81-12-49(r), Mississippi savings associations may engage in any activity permitted a federally chartered savings and loan association in that state. And, of some significance, savings associations may now use the appellation "savings bank," contrary to the former law reserving the title "bank" for commercial banking institutions. Miss.Code Ann. § 81-3-3; Miss Savings Rule 16.1.

Consistent with the previous sharp separation of functions, banks and savings associations were accorded different treatment. One difference central to the case at bar involves branch units. A savings association may open branches throughout the state, Miss.Code Ann. § 81-12-175, whereas the state commercial banks, since the 1986 amendments, are allowed to open branches only in the county in which the bank's principal office is located, or within a 100-mile radius, Miss.Code Ann. § 81-7-7.

The Comptroller is responsible for the supervision of 5,000 national banks chartered under federal law. Congress has empowered the Comptroller to make definitive judgments on the application of national banks for permission to relocate or to open branches, 12 U.S.C. §§ 30, 36. The federal branching provision, commonly referred to as the McFadden Act, permits a national bank to open branches anywhere that a state bank may. The National Bank Act, 12 U.S.C. § 36, provides in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, estab-

> lish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * * * *
>
> (h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

In his consideration of the application of Deposit Guaranty for permission to open a Gulfport branch, the Comptroller received in evidence a study of the banking industry in Mississippi reflecting that savings associations offered traditional banking services such as, *inter alia*, interest-bearing checking accounts, commercial checking accounts, consumer loans, business and construction loans, savings deposits, and related incidental services. After considering the evidence presented, applicable federal and state statutes and regulations, and the relevant jurisprudence, the Comptroller determined that savings associations in Mississippi were engaged in the business of banking and were "State banks" within the meaning of 12 U.S.C. § 36(h). The Comptroller accordingly concluded that "[n]ational banks in Mississippi may, thus, branch to the same extent as Mississippi savings associations, *i.e.*, statewide." We are charged to uphold the Comptroller's determination if we find it to be a "permissible construction" of the National Bank Act. *See Chevron v. Natural Rescurces Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *Texas v. United States*, 756 F.2d 419 (5th Cir.),

cert. denied, —— U.S. ——, 106 S.Ct. 129, 88 L.Ed.2d 106 (1985). In reaching his conclusion the Comptroller applied a federal definition of banking, eschewed state-applied labels, and looked primarily to the function of the institutions.

Analysis

The threshold issue we confront is whether the Comptroller, in his interpretation and application of a federal statute, in this case 12 U.S.C. § 36(h), should look to state or federal law to define the statute's terms. We conclude and hold that in his interpretation of 12 U.S.C. § 36(c) and (h) the Comptroller may seek the guidance of helpful state law, but is bound to follow federal law in defining terms contained in the federal statute. This includes, of course, the terms "State bank" and "banking business."

The Supreme Court's reasoning in *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966), illuminates our path. The Court there held that national banks in Utah were constrained to establish branches in the same manner as state banks in that state. The Court opined that "[i]t appears clear from . . . the legislative history of § 36(c)(1) and (2) that Congress intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." 385 U.S. at 261, 87 S.Ct. at 497. It was this concern for competitive equality that drove the Court's decision in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969), wherein it held that the definition of "branch" in 12 U.S.C. § 36 was a matter of federal law.

In *Plant City*, the Court emphasized the importance of employing a federal definition to ensure that national banks would be able to perform the same branching functions as neighboring state banks. The Court relied on the

legislative history of the McFadden Act, codified as 12 U.S.C. § 36, reasoning that to allow the states to regulate banking functions "would make them the sole judges of their own powers. Congress did not intend such an improbable result. . . ." 396 U.S. at 133-34, 90 S.Ct. at 343. The court cited legislative history demonstrating that Congress was concerned that "neither system have advantages over the other in the use of branch banking" and that national banks would be protected "from the unrestricted branch bank competition of state banks." *Id.* at 131, 90 S.Ct. at 342.[1]

The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks."

We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

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[1] In other areas traditionally regulated by state law, the Supreme Court has applied federal definitions to federal statutory terms even when the federal statute contains references to state law provisions. *See Chase Manhattan Bank v. City Finance Admin.*, 440 U.S. 447, 99 S.Ct. 1201, 59 L.Ed.2d 445 (1979) (definition of "tax" under federal statute governing state taxation is a question of federal law); *SEC v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959) (definitions of "insurance" and "annuities" for purposes of federal regulation are questions of federal law even if such definitions work to displace or hinder state regulation).

Function versus Title

Having concluded that the federal definition of banking business controls the meaning of that term in § 36 (h), we must now determine whether the Comptroller correctly placed the Mississippi savings associations within that subsection. The Comptroller looked to function and found as a fact that the savings associations were engaged in the banking business. The district court did not address those factual findings.

We agree with the Comptroller that the language of § 36(h) expressly requires a consideration of function. The statute directs that the term "State bank," as used therein, "shall be held to include . . . corporations or institutions carrying on the banking business under the authority of state laws." We hold that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as "savings banks," were actually "carrying on the banking business." This task could only be accomplished by a targeted functional analysis.[2] The very recent Supreme Court decision in *Clarke v. Securities Industry Association*, —— U.S. ——, 107 S.Ct. 750, —— L.Ed.2d —— 1987), implicitly supports the Comptroller's use of this functional analysis methodology.

As noted above, Congress has defined the business of banking, stripped to its essentials, as accepting deposits, paying checks, and making loans. As observed by the Comptroller, these three primary functions are listed in

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[2] Our colleagues in the District of Columbia Circuit used this approach in defining "branch" in *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976). There, the court determined that all bank offices, state or national, that perform any one of three branch banking services, are "branches" for purposes of the National Bank Act, regardless of the offices' actual labels. Thus, for example, automatic teller machines constitute "branches" for purposes of the Act.

the National Bank Act's definition of branch in 12 U.S.C. § 36(f).[3]

As a reviewing court, we must accept the Comptroller's factual findings unless we find that they are arbitrary or capricious. 5 U.S.C. § 706. Our determination must be made on the basis of the administrative record. *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The Comptroller's factual determination that the savings associations are engaged in the banking business is amply supported by the record. These associations, consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties. This factual finding by the Comptroller is neither arbitrary nor capricious. It is patently correct.

In reaching our conclusion we are not unmindful of the Garn-St. Germain Act, adopted in 1982, 12 U.S.C. § 1461 *et seq.*, expanding the regulatory scheme for savings and loan associations. That regulatory scheme, intended to ensure that savings and loan institutions main-

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[3] The Supreme Court has defined "banking business" similarly in antitrust cases. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), the Court stated that of the various banking services and products,

> the creation of additional money and credit, the management of the checking account system, and the furnishing of short-term business loans would appear to be the most important.

374 U.S. at 326-27, 83 S.Ct. at 1721. The Court has repeated this delineation of banking functions in subsequent antitrust cases, *see, e.g., United States v. Phillipsburg National Bank*, 399 U.S. 350, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970); *United States v. First National Bank*, 376 U.S. 665, 84 S.Ct. 1033, 12 L.Ed.2d 1 (1964).

tain their status "as the nation's primary home lender," S.Rep. No. 641, 97th Cong.2d Sess. 88, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3131, differs from the regulation of the traditional bank. The principal difference involves the limits placed on the commercial and consumer loans and investments of the savings institutions, designed to protect their capacity to make needed home loans. That legislation neither proscribes the functional analysis made by the Comptroller nor militates against his interpretation of 12 U.S.C. § 36(h).

The Comptroller did not incorrectly interpret the controlling statutory provisions. His interpretation was more than a mere "permissible construction," all that is required in order to secure this court's deference. *See Chevron v. Natural Resources Defense Council*; *United States v. Riverside Bayview Homes, Inc.*, —— U.S. ——, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); and *Texas v. United States.* We find the Comptroller's interpretation to be amply supported by the express "language employed by Congress," giving the words it chose their "ordinary meaning." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

The district court erred in enjoining the Comptroller and Deposit Guaranty. The injunction imposed is vacated and the judgment is reversed. The Comptroller is entitled to judgment as a matter of law. The matter is returned to the district court for entry of an appropriate judgment.

REVERSED.

No. 86-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT DEPOSIT GUARANTY NATIONAL BANK IN OPPOSITION

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QUESTION PRESENTED

The National Bank Act, 12 U.S.C. § 36, provides that national banks may branch wherever the state authorizes "state banks" to branch. Section 36(h) defines "State bank" as follows:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The question presented by this case is whether the Comptroller correctly construed this statute to extend to national banks in Mississippi branching rights equivalent to those of state-chartered savings associations that, under the authority of Mississippi law, call themselves savings banks and carry on the banking business statewide by receiving deposits, making commercial loans, and negotiating checks and drafts.

RULE 28.1 LIST

The parent companies, subsidiaries or affiliates of respondent Deposit Guaranty National Bank are as follows:

Deposit Guaranty Mortgage Company
Consurve, Inc.
Deposit Guaranty Foundation
Parking Services, Inc.
DGEP, Inc.
Deposit Guaranty Corp.
DGC Services Company
Deposit Guaranty Financial Services, Inc.
Deposit Guaranty Investments, Inc.
Deposit Guaranty Omaha, N.A.
Credit Life Agency, Inc.
Deposit Guaranty Bank Securities Corporation
Guaranty Insurance Agency, Inc.
Guaranty Leasing Company

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

Statutes:

TABLE OF AUTHORITIES—Continued

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BRIEF OF RESPONDENT DEPOSIT GUARANTY NATIONAL BANK IN OPPOSITION

Respondent Deposit Guaranty National Bank ("Deposit Guaranty") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's judgment in this case.

STATEMENT OF THE CASE

The facts are well stated in the Fifth Circuit's opinion, *Department of Banking and Consumer Finance v. Clarke*, 809 F.2d 266, 267-269 (5th Cir. 1987), App. 36a-40a.

The petitioner Department of Banking and Consumer Finance ("petitioner") commits a serious factual error in its Statement, an error which is repeated throughout

the Petition, from the Question Presented to the last footnote on the last page.

It is undisputed in the administrative record, the findings of the Comptroller (App. 16a-20a), and as a matter of both state and federal law that Mississippi charters as "banks" not only the institutions petitioner regulates, but also institutions regulated by the State Department of Savings Associations. Despite this undeniable fact, petitioner repeatedly uses the terms "state banks," or "state-chartered banks" as if the only such institutions in Mississippi were those petitioner regulates. That was true prior to 1980, but is no longer true today.

Prior to 1980, the only institutions in Mississippi chartered as banks by the state were state commercial banks regulated by petitioner. These were the only state institutions that could call themselves "banks." Miss. Code § 81-3-3 (1972). They were restricted from branching more than 100 miles from their principal office. See Miss. Code §§ 81-7-5 and 81-7-7 (1972). Because of statutory changes made by the legislature after this suit was filed but before the Fifth Circuit's decision, they will be able to branch statewide with certain exceptions on July 1, 1989. Miss. Code § 81-7-7 (Supp. 1986).

Beginning in 1980, the Mississippi legislature by statute and the Mississippi Department of Savings Associations by regulation created a second kind of financial institution chartered by Mississippi as banks. Not only can these institutions carry on the traditional powers and functions of banks, including receiving deposits, making commercial loans, and negotiating checks, they may and do charter themselves as "savings banks." App. 37a-38; *See* Administrative Record ("A.R.") 294 (advertisement for "First Jackson Savings Bank"). Significantly, Mississippi's savings banks operate with a greater freedom than do federal savings banks. They need not finance a single home purchase and may have a purely commercial

loan portfolio.[1] They may and do now branch anywhere in the State without geographical restriction. Miss. Code § 81-12-175 (Supp. 1986).

The Petition ignores every post-1980 development in Mississippi law and describes this case to the Court as if petitioner were a Rip Van Winkle awaking after a seven-year slumber. Ignoring both the now-common title "savings bank" and the statutory name "savings association," Miss. Code § 81-12-1 et seq. (Supp. 1986), petitioner resorts to the quaint description of these institutions as mere "savings and loans." The Petition repeatedly makes statements that are simply not true, or at best assume what they seek to prove. The Petition asserts that only one statute governs "state chartered banks," Pet. at 3, and that the branching sought by Deposit Guaranty "would not have been permissible for any of Mississippi's state-chartered banks," Pet. at 4.[2] These

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[1] Federal savings associations may have 90 per cent of their assets in commercial type investments. Vartanian, *The Garn-St Germain Depository Institutions Act of 1982: The Impact on Thrifts*, 2 Housing Fin. Rev. 167, 173-174 (1983). Petitioner's comment concerning the "traditional housing financing role" of federal savings associations, Pet. 7 n.4, ignores this reality of the new law, and, in any event, has no application to Mississippi. Mississippi savings banks may invest up to 25% of their assets in certain commercial loan obligations and are not bound by the 10% federal limit on such loans. Compare Miss. Code § 81-12-155 (b) (Supp. 1986), *with* 12 U.S.C. § 1464(c)(1)(R) (Supp. 1986). As a result, Mississippi savings banks may have *all* of their assets in commercial type investments, and need not have a single housing loan.

[2] As stated, this error permeates the Petition. See, e.g., pp. (i) ("branching that is prohibited by state law for state banks"), 5 ("provision of Mississippi law governing the chartering and operating of state-chartered banks"), 10 ("state law does not permit 'state banks' to engage in the branching sought"), 13 ("states would be forced to expand branching privileges for state-chartered banks"), 14 n.7 ("will extend the geographic scope of permissible branching by state banks"). Each of these statements is true only with respect to state-chartered banks regulated by

statements are true for those institutions regulated by petitioner. They are not true for the institutions chartered as banks by petitioner's rival, the Department of Savings Associations.

In Mississippi, savings associations are indisputably carrying on the banking business and are authorized by the state to do so statewide. It is for this reason that both the Comptroller and the Fifth Circuit found that national banks in Mississippi may branch statewide in order to ensure competitive equality under 12 U.S.C. § 36(h).

REASONS WHY THE WRIT SHOULD BE DENIED

1. There is No Other Court of Appeals Decision Concerning the "Banking Business" in Issue Here. There is No Circuit Conflict that Would Warrant a Grant of Certiorari.

The issue on the merits here is whether the Comptroller of the Currency correctly construed the National Bank Act, 12 U.S.C. § 36, to extend to national banks in Mississippi branching rights equivalent to those of state-chartered savings institutions authorized by Mississippi to carry on the banking business statewide.

The Act provides that national banks shall have competitive equality with "state banks" insofar as branching is concerned. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966) ("*Walker*

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petitioner. It is not true with respect to other state-chartered banks. For example, petitioner's statement of the question presented, to be accurate, should be restated as follows:

> The question presented is whether a national bank may engage in branching that is prohibited by state law for State banks *regulated by petitioner*, on the ground that such branching is permitted for *state banks regulated by another state agency*, thereby placing *national* banks in a position of competitive *equality* with *state banks regulated by that other agency* in the matter of branching.

Bank"); *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*). The Act defines "state bank" in § 36(h) as follows:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

The Fifth Circuit held that the Comptroller acted within his authority in finding that Deposit Guaranty is entitled to branching rights equal to those of Mississippi savings institutions, because those institutions are authorized by the State to call themselves "banks" and to engage in the "banking business." They are thus "state banks" and the Act guarantees national banks branching equality with them.

The construction of the words "banking business" was crucial to the Fifth Circuit's holding and the Comptroller's determination. The court held that construction of § 36(h) was a matter of federal law, and affirmed the Comptroller's interpretation that:

> [T]he banking business, reduced to essentials, involves receiving deposits, making commercial loans, and negotiating checks and drafts. 809 F.2d at 268; App. 37a.

The Fifth Circuit upheld the Comptroller's finding that Mississippi had authorized savings institutions with statewide branching powers to engage in these activities. Specifically, the court upheld the finding that Mississippi savings institutions may receive and pay interest on savings deposits and other accounts, may offer interest-bearing checking accounts, and may make commercial loans. The court agreed with the Comptroller's conclusion that national banks in Mississippi were entitled to branch statewide in order to ensure competitive equality. *See* 809 F.2d at 268.

Petitioner contends that the Fifth Circuit's decision conflicts with the decisions of two courts of appeals and two district courts. In fact, however, none of those decisions involved the "banking business" found here and each is factually distinguishable. There is no conflict because the decisions are not concerning the "same matter." Sup. Ct. R. 17.1(a).

a. *The decisions cited were not regarded as conflicting by the lower courts.*

i. *The District Court did not believe those cases were on point here.*

The District Court, which on other grounds ruled in favor of the petitioner, specifically rejected petitioner's claim that these decisions were on point here. The Court said, *Department of Banking and Consumer Finance v. Selby*, 617 F. Supp. 566, 571 n.15 (S.D. Miss. 1985):

> This court is of the opinion that the substantive analyses utilized in these cases is not controlling for each case fails to address directly the question in issue here.

ii. *The Fifth Circuit's opinion does not mention the decisions.*

Petitioner briefed these decisions and made them the subject of oral argument in the Fifth Circuit. The Fifth Circuit did not find it necessary to mention these decisions in its opinion.

iii. *Petitioner did not seek en banc review in the Fifth Circuit.*

Mindful of this Court's caseload, the Fifth Circuit has adopted procedures that favor en banc review of decisions that conflict with decisions of other circuits. Its Internal Operating Procedure to Fed. R. App. P. 47 provides that when its opinions "initiate an express conflict with the law in another circuit," they are to be circulated

en banc before release, and "are subject to polling procedures for en banc consideration should any judge request it."

Here not only was there no express conflict, but the petitioner did not seek to avail itself of the ordinary en banc review procedure, which was available to it to attempt to persuade a majority of the Fifth Circuit that the decisions were in conflict. *See* Fed. R. App. P. 35. Petitioner bypassed that opportunity and should not now be heard to seek the extraordinary remedy of certiorari in this Court.

b. *The decisions did not involve the "banking business" found here.*

It was critical to the Fifth Circuit's decision that Mississippi savings institutions are engaged on a statewide basis in the business of banking, including i) offering commercial loans, ii) paying interest on savings deposits, and iii) offering checking accounts to some customers. Petitioner is mistaken in claiming that the Fifth Circuit held broadly that a national bank could branch anywhere "other state financial institutions" could branch. *See* Pet. at 7 (emphasis omitted). The Fifth Circuit's narrow holding turns on a finding that these three services are offered by Mississippi savings associations. The cases on which petitioner relies do not involve these services. The decisions are distinguished not only in the Comptroller's decision, Pet. App. 8a-12a, but also in the literature. *See*, Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. 243, 252-253 (1983).

In *Mutschler v. Peoples National Bank*, 607 F.2d 274, 279-280 (9th Cir. 1979), the Ninth Circuit held that a national bank could not branch statewide in Washington even though certain state institutions called "mutual savings banks" could branch statewide. There is no suggestion in the opinion that mutual savings banks in Wash-

ington were authorized to engage, or *in fact* were engaged in the banking business by, for example, i) offering checking services or ii) making commercial loans. *See also, State Chartered Banks in Washington v. Peoples National Bank*, 291 F. Supp. 180, 198-199 (W.D. Wash. 1966).

In *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345, 355-356 (8th Cir. 1977), *cert. denied*, 434 U.S. 877 (1977), the court rejected a contention that a national bank should be able to branch statewide because a state-*owned* bank, the Bank of North Dakota, had that power. There is no contention in this case that Mississippi savings institutions are state-owned. In fact, *Dakota National Bank* supports the Fifth Circuit's holding because there the Eighth Circuit concluded that "competitive quality [sic] was intended to be maintained between the privately-owned banking institutions." 554 F.2d at 356.

In *First National Bank & Trust Co. of Okmulgee v. Empie*, No. 78-296-C (E.D. Okla. November 15, 1982) (A. R. 424-434), the court rejected a contention that national banks in Oklahoma should be able to branch statewide because of the powers the State gave to a "trust company." The court held both that trust companies in Oklahoma were not in the banking business and that they did not have the authority to branch statewide. Opinion at 6 n.2, 8-9 n.4 (A.R. 429, 431-432).

In sum, none of these cases involved competition between national banks and state-chartered institutions "carrying on the banking business." None involved state-chartered financial institutions that branched statewide and offered not only i) deposit services, but also ii) checking and iii) commercial loans to their customers. The Fifth Circuit found it to be controlling that state-chartered savings associations in Mississippi are engaged in each of these aspects of the "banking business." Because the allegedly conflicting decisions did not involve

the "same matter" as the Fifth Circuit's opinion, there is no conflict of decisions within the meaning of the rules of this Court.

2. The Fifth Circuit's Decision is Consistent with Walker Bank and Plant City.

Both the Comptroller, App. 5a-8a, and the Fifth Circuit, 809 F.2d at 269-270, App. 40a-41a, considered this Court's prior decisions and accurately applied them here.

In *Walker Bank*, this Court held that a national bank in Utah could not branch except under the terms state law permitted state banks to branch. State law prohibited branching in a home municipality except by merger. 385 U.S. at 261. The Court held that national banks could not branch de novo and must also limit themselves to branching by merger. *Id.*

In this case the branching powers of Mississippi savings banks have no such limits. The principle of competitive equality applied in *Walker Bank* supports the decision of the Comptroller to permit Deposit Guaranty to branch where those banks can branch.

Petitioner seeks to place a gloss on *Walker Bank* by construing it to require that Deposit Guaranty "meet the Mississippi requirements for designation as a savings and loan [sic]," Pet. at 10-11, before it can branch. This is incorrect. *Walker Bank* held that a national bank must comply with state law specifically regulating branching. It did not require the national bank to comply with any state regulation other than the law restricting branching. 385 U.S. at 261. As § 36(c) states, it is the "*restrictions as to location* imposed by the law of the State" (emphasis added) which matter. The Question Presented by petitioner concedes that under § 36(c) a national bank may branch "if it meets the *branching restrictions* imposed by that state's law" (emphasis added). Nothing in § 36 or in *Walker Bank* requires a national bank to meet any restrictions other than those on branching. Here there are no restrictions on savings associations branching that would prevent a branch from opening.

Petitioner contends that the Fifth Circuit's decision is contrary to *Plant City* because it upsets "competitive equality" between state commercial banks and national banks. That case, however, did not involve a state banking system that permitted one group of state institutions in the banking business to branch statewide while another group could not. Nothing in the National Bank Act forbids Mississippi from discriminating against one set of its banking institutions; but Mississippi may certainly not discriminate against national banks.

The Fifth Circuit discussed *Walker Bank* and *Plant City* at length, and reasoned that the Comptroller's decision here in fact promoted competitive equality, 809 F.2d at 269-270, App. 41a. The court said:

> The principle of competitive equality guided the Comptroller's analysis and informed his decision in the present case. He observed that "the concept of competitive equality requires a federal definition of 'State bank' to prevent states from disadvantaging national banks vis-a-vis state-chartered institutions by merely denominating these institutions 'banks' and treating them somewhat differently from state commercial banks, though not so differently as to prevent these institutions from competing with national banks."
>
> We conclude that the Comptroller's use of federal law and the competitive equality standard was legally correct. By doing so the Comptroller was faithful to the congressional mandate and demonstrated considerable expertise in balancing national and state interests in this constantly evolving area.

Moreover, the Fifth Circuit followed *Plant City*, 396 U.S. at 133-134, in holding that § 36 is to be construed as a matter of federal, not state law.[3] Its decision is in complete harmony with the precedents of this Court.

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[3] *Plant City* expressly rejected the contention that § 36(c) and (f) should be construed as a matter of state, not federal law. In so holding, the Court rejected the argument of petitioner's present

3. Mississippi has now Altered the Statutes on which Petitioner Relies.

On April 14, 1986, while this case was pending on appeal, Mississippi adopted legislation altering the branching laws applicable to banks regulated by the petitioner Department of Banking. The statute phases out the 100-mile limit for branching by state commercial banks which is replaced by statewide branching on July 1, 1989. Miss. Code § 81-7-7(5) (Supp. 1986). During the interim periods, state commercial banks may accomplish statewide branching through mergers subject to certain asset limitations. Miss. Code § 81-7-8(3) (Supp. 1986).

These changes do not moot this case. The Gulfport branch Deposit Guaranty seeks to open is more than 100 miles from Jackson, and so exceeds current limits for a state bank regulated by petitioner. Also, the new statute does not give the banks petitioner regulates complete equality in branching with the banks regulated by the Department of Savings Associations. *Compare* Miss. Code § 81-7-8 (Supp. 1986) *with* Miss. Code § 81-12-175 (Supp. 1986).

This case would, however, be a poor vehicle for consideration of the issues petitioner seeks to raise. Prudence suggests that certiorari be denied in this case and the issue dealt with, if necessary at all, in a case from another state.

Petitioner claims that this decision will affect 21 states other than Mississippi whose statutes grant "savings and loan associations" broader branching rights than "banks." Pet. 11-12 & n.6. Petitioner offers no proof that i) these states permit state savings institutions to engage in the banking business as found here, ii) that such institutions exist in those states and iii) that they in fact branch statewide. Even if this were shown, all 21 states differ

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counsel, who appeared there on behalf of the National Association of Supervisors of State Banks. 396 U.S. at 133-134.

from Mississippi in that they now permit the use of multibank holding companies, a device by which national banks may operate statewide without using branches.[4] In any case, if there is an impact in another state, the question can be addressed in the event another Court of Appeals disagrees with the Fifth Circuit on facts similar to those presented here.

4. Other Courts of Appeals are Likely to Follow the Fifth Circuit if and when this Issue is Presented to Them.

It is likely that if and when the other Courts of Appeals are called to consider this issue, they will agree with the Fifth Circuit.

a. This Court's recent decisions strongly support the Fifth Circuit's holding.

In *Board of Governors v. Dimension Fin. Corp.*, 106 S. Ct. 681 (1986), this Court addressed a "simple and broad definition" of "bank" formerly found in 12 U.S.C. § 1841(c). That definition was:

> [A]ny national banking association, or any State bank, savings bank or trust company.

This Court said that this broad language would include not only commercial banks but also institutions which offered only limited checking account services and did not make commercial loans. See 106 S. Ct. at 684-685. The Court also emphasized the need for judicial deference to the plain meaning of statutes. 106 S. Ct. at 686-689.

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[4] *Compare* Pet. 12 n.6 *with* A. R. 230 (chart showing multibank holding companies in every listed state except Illinois, Indiana, and Kansas). Since the proceedings before the Comptroller, Illinois, Indiana, and Kansas have each passed statutes permitting the formation of multibank holding companies. *See* Ill. Ann. Stat. ch. 17, pars. 2501-2513 (Smith-Hurd 1982 & Supp. 1986); Ind. Code Ann. §§ 28-2-14-1 to -17 (Burns Supp. 1986); Kan. Stat. Ann. §§ 9-519 to -524 (Supp. 1986).

As applied here, *Dimension Financial* supports a reading of § 36(h) that would be even broader than that adopted by the Comptroller. It suggests that a state institution could be a "state bank" under § 36(h) without offering all the services the Comptroller found essential here. Petitioner's argument for a definition of § 36(h) even narrower than that chosen by the Comptroller directly contravenes *Dimension Financial*.

Moreover, in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 762 n.23 (1987), this Court expressly rejected as "extreme" an argument that national banks must be identical to state banks with respect to activities other than branching of core banking functions. The Court emphasized deference to the Comptroller's construction of federal statutes concerning the banking business. *Id.* at 759-762. Petitioner overlooks that holding here and urges the Court to ignore the principle of deference.

Both *Dimension Financial* and *Securities Industry Association* lend strong support to the Fifth Circuit's reliance on the plain language of the statute and its deference to the Comptroller's construction of the National Bank Act. They make conflicting decisions from other Courts of Appeal unlikely.

b. *The legislative history supports the Fifth Circuit's decision.*

The Fifth Circuit did not discuss the legislative history of § 36(h). In view of this Court's admonition in *Dimension Financial* that plain language controls over ambiguous legislative history, the Fifth Circuit's choice is hardly surprising. Moreover, there is no legislative history that speaks directly to the definition of § 36(h). It is correct to say, however, that the legislative history generally supports certain propositions.

First, Congress intended in the McFadden Act of 1927, as revised by the Banking Act of 1933, that national

banks have competitive branching equality with the institutions that competed with them, however denominated. Congress was familiar with the term "commercial bank" and did not choose to limit the definition of § 36(h) to commercial banks. See, e.g., 66 Cong. Rec. 1776 (1925).

Section 36(h) is a functional definition. During the drafting of the Bank Act of 1933, Dr. H. Parker Willis served as a technician and advisor to the Senate Committee on Banking and Currency. Dr. Willis was a professor in the business school at Columbia University and was charged by the committee to serve as its "expert draftsman." 75 Cong. Rec. 10070-10072 (1932). In 1935, Dr. Willis published an article in the Columbia Law Review concerning the Banking Act of 1933. Willis, *The Banking Act of 1933 in Operation*, 35 Colum. L. Rev. 697 (1935). Concerning branch banking, he stated:

> The framers of the act had originally intended to make a very liberal provision for the extension of branch banking but this action was out of the question because of the continuous opposition of the small banks and of those legislators who represented them to any such measure. *It was, however, only a provision of ordinary justice to say to the national banks that they might engage in branch banking to the extent permitted to their competitors, organized under state law, whom they were obliged to meet in open market*, and who should obviously not be better treated than they.

35 Colum. L. Rev. at 703. (Emphasis added). As Justice Stevens said in his concurrence in *Securities Industry Ass'n*, § 36 was to enable national banks "to effectively compete with state banks that could legally branch." 107 S. Ct. at 766.

Second, the legislative history demonstrates that Congress intended that the powers of national banks would expand as legislatures expanded state laws. Petitioner argues that the statutory purpose was to "freeze" branch-

ing "in its status quo," Pet. at 13, but this contention rests on a quotation petitioner takes entirely out of context. *See* J. Chapman & R. Westerfield, *Branch Banking* 108 (1980 reprint) quoted in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750, 764 n.3 (1987) (Stevens, J., concurring). The remark quoted explains opposition to the 1927 Act, which did not permit branching outside city limits. It does not apply to the Act as amended in 1933 and as in effect today.

In fact, this Court has twice held that Congress intended changes in state law to produce corresponding changes in the powers of national banks. In *Plant City*, 396 U.S. at 133, this Court said:

> The policy of competitive equality is therefore firmly imbedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and *build into the federal statute a self-executing provision to accommodate to changes* in state regulation. (Emphasis added.)

See also, Walker Bank, 385 U.S. at 258. Here Mississippi has changed its state regulation and there must be a corresponding effect on the authority of national banks to engage in branching.

Future courts of appeals which consider this legislative history will no doubt be persuaded that it strongly supports the Comptroller's position. To counsel's knowledge, this is the first case in which a court of appeals has had before it a complete survey of the legislative history of § 36(h) by counsel supporting the Comptroller.

c. *The dictum in one decision relied on by petitioner is plainly wrong.*

Petitioner relies on certain language in *Mutschler v. Peoples National Bank*, 607 F.2d 274, 279-280 (9th Cir. 1979) in which the Ninth Circuit opined that a national bank could not branch statewide in Washington if it

could not satisfy the state definition of "mutual savings bank." Under the Ninth Circuit's logic in *Mutschler*, a national bank would have to have all the attributes of a "savings bank" before it would be entitled to competitive equality under § 36(h).

This logic is plainly wrong for two reasons not considered by the *Mutschler* court.

First, under § 36(c) it is only the state "restrictions as to location" which apply to national banks, not restrictions on organizational form.

Second, Congress knew in 1933 that national banks were not, and could not be, savings banks or trust companies. Despite that knowledge, Congress provided in § 36 that national banks could branch wherever state law authorized trust companies or savings banks to branch. The *Mutschler* dictum imposes on § 36 branching rights a restriction that Congress could *never* have intended national banks to meet.

For example, savings banks, usually mutually owned by their depositors, historically concentrated on long-term lending in the home mortgage market. Fein, *The Fragmented Depository Institutions System: A Case for Unification*, 29 Am. U.L. Rev. 633, 645-650 (1980). National banks must be stock institutions, 12 U.S.C. § 26, and until 1964 could not offer mortgages more than five years in length. *Fein*, 29 Am. U.L. Rev. at 643; Housing Act of 1964, Pub. L. No. 88-560, § 1004, 78 Stat. 769. A savings bank could not even get a federal charter until 1978. See Pub. L. No. 95-630, amending 12 U.S.C. § 1462(d), 92 Stat. 3710. Conversely, a federal institution could not bear the name "savings bank" prior to 1978.

Trust companies were originally not banks as such, but more general corporations. They originated as fiduciaries, but soon became involved in the securities business as well as banking. E. Symons & J. White, *Banking Law*

33 (2d ed. 1984). National banks have always been limited to the "banking business," 12 U.S.C. § 24(7).

Congress was aware of these differences. See 66 Cong. Rec. 4436 (1925) (Sen. Glass); 67 Cong. Rec. 2829-2830 (1926) (Rep. McFadden). In giving national banks the same branching rights as "savings banks" or "trust companies," Congress cannot possibly have intended that the national bank would be required to become a savings bank or trust company in order to enjoy those rights.

For these reasons, it is unlikely that any future court considering these issues will follow the *Mutschler* dictum.

CONCLUSION

The Fifth Circuit's decision turns on facts not found in the cases from other courts of appeals. Neither of the courts below found those cases to control the issues presented here. Both the Comptroller and the Fifth Circuit faithfully followed this Court's construction of § 36 in prior cases. The Fifth Circuit's emphasis on the plain language of the statute and its deference to the Comptroller is entirely in keeping with this Court's most recent decisions in this area. There is no conflict of decisions.

It is possible that other courts may be called on to construe similar interpretations of the Comptroller involving laws of other states. Mississippi, however, has changed its law, and this case is a poor vehicle for certiorari consideration. Also, it is likely that other courts of appeal will follow the Comptroller and the Fifth Circuit, making review by this Court unnecessary.

Deposit Guaranty respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-1575

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,

Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ILLINOIS, IOWA, KENTUCKY, LOUISIANA, NEBRASKA, PENNSYLVANIA AND WISCONSIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

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ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, and DEPOSIT GUARANTY NATIONAL BANK,

Respondents.

BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The State of Indiana, through the Attorney General submits this brief as amici curiae in support of the petition for a writ of certiorari sought by the Department of Banking of Consumer Finance of the State of Mississippi in the above captioned matter. The State of Indiana administers state chartered financial institutions within its jurisdiction. The State of Indiana's primary job is to promote the safety and soundness of the

financial institutions for the welfare of its citizen. In the view of the State of Indiana and amici states, the decision of the Court of Appeals in the present case, if allowed to stand, will cause substantial and unnecessary confusion as to how a national bank can branch in a state. Because of the importance of clarifying the role of the definition of branching, the State of Indiana and amici states respectfully pray that the petition for certiorari be granted.

STATEMENT OF THE CASE

This case arises out of a decision by the Comptroller of the Currency to permit Deposit Guaranty National Bank of Jackson, Mississippi ("Deposit Guaranty") to establish a branch in Gulfport, Mississippi. National banks under federal law are permitted to branch in a state only to the extent that state law in the state permits state banks to branch. This requirement was established by the McFadden Act of 1927, codified in the National Bank Act at 12 U.S.C. §36 ("The McFadden Act"), which says in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language, specifically granting such authority and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. §36(c) (1952). This Court has held that the purpose of this statutory provision is to "place national and state banks on a basis of 'competitive equality' insofar as branch banking [is] concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

The Comptroller's decision recognized that the Mississippi statute governing its state chartered banks, which restricted such branching to within 100 miles of the bank's main office, would preclude the branching requested by Deposit Guaranty

to be located more than 100 miles from its main office. See Miss. Code Ann. §§81-7-5 and 81-7-7 (1972). Under a section of the Mississippi Code relating to the incorporation and regulation of state savings and loan associations, such associations are authorized to branch without a territorial limitation and thus may branch statewide. See Miss. Code Ann. §81-12-175 (Supp. 1986). An application by a national bank located in Indiana and amici state would have approximately the same impact. The definition of "state bank" in Section 36(h) of the McFadden Act reads in pertinent part:

> The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

12 U.S.C. §36(h) (1927). The Comptroller concluded that this language establishes a federal "functional" definition of "state bank" and under that definition, savings and loans in Mississippi compete to some extent with banks. The Comptroller concluded that Mississippi savings and loans offer certain services in competition with commercial banks thus such conduct is sufficient to bring them into the "business of banking."

The Comptroller concluded that the McFadden Act permits a national bank to branch to the extent that Mississippi allowed branching by state savings and loans, i.e., without geographic restrictions, and, on July 9, 1985, the Comptroller gave Deposit Guaranty approval to open the requested branch in Gulfport.

If the Court of Appeals decision were to stand, the impact on Indiana and amici states' financial institutions would be greatly changed. National banks located in central Indiana would have more branching capability than state-chartered banks. The state legislature would also have to amend the powers of State chartered savings and loans to allow them to branch state wide. As the law in Indiana presently exist, national banks would be allowed to literally branch state wide under this decision. Competitive equality and the dual system of banking would suffer a

severe blow. State chartered banks would therefore want to convert their state charters for a federal charter.

Branching under the Comptroller's decision permits national bank to engage in acts that would not have been permissible for any of Mississippi's state-chartered banks. Thus, Mississippi state-chartered banks would be at competitive disadvantage. This outcome is what McFadden Act was intended to preclude.

The Department of Banking and Consumer Finance of the State of Mississippi brought this action against the Comptroller and Deposit Guaranty in the federal district court for the Southern District of Mississippi, challenging the Comptroller's decision under the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* The action was brought for a declaratory judgment that the Comptroller's decision was unlawful, and therefore null and void. Preliminary and permanent injunctive relief prohibiting the Comptroller from issuing a certificate of authority for the proposed branch was also sought.

The District Court entered final judgment for The Mississippi Department and issued a permanent injunction. The Comptroller appealed to the Fifth Circuit Court of Appeals.

The Department of Banking and Consumer Finance of the State of Mississippi represented by the Mississippi Attorney General contends that the Comptroller is ignoring the express language of Sections 36(c) and 36(h) of the McFadden Act. These sections incorporate state law. The Comptroller's and the Court of Appeals decision ignores congressional intent, besides destroying competitive equality between state and national banks in the matter of branching. Section 36(h) defines "State bank" to include only those "institutions carrying on the banking business under the authority of State law." Savings and loan associations do not fall under the provision of Mississippi law governing the chartering and operating of state-chartered banks. See Miss. Code Ann. §81-7-1 *et seq.* (1972). Indiana and the amici states have similar statutory provisions. In addition, state savings and loans are subject to limitations that are not applicable to commercial banks. See Miss. Code Ann. §81-12-1

et seq. (Supp. 1986). Indiana and the amici states also have similar statutory provisions. In the absence of any reference to savings and loans in the McFadden Act or in the legislative history dealing with the branching restrictions of the Act, congressional intent has always been that savings and loans be treated separately from banks. Neither the language of the McFadden Act nor its legislative history provide support from the proposition that Congress ever intended competitive inequality between state banks and national banks in the matter of branching.

In 1933, Congress amended the McFadden Act when it passed the Banking Act of 1933. The Home Owners' Loan Act of 1933, codified at 12 U.S.C. §§1461-1470 authorized the establishment of federal savings and loans. Neither statute indicated any interrelationship between the branching activities of the two types of institutions. Branching of savings and loans has been determined to be an implied power in the statute. *North Arlington Nat'l Bank v. Kearney Federal Savings & Loan Ass'n*, 187 F.2d 564 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); *First Nat'l Bank of McKeesport v. First Federal Savings & Loan Ass'n of Homestead*, 225 F.2d 33, 35 (D.C. Cir. 1955). Banks do not have the right to protest savings and loan branching on the grounds that they compete with those institutions *Union Nat'l Bank of Clarksburg v. Home Loan Bank Board*, 233 F.2d 695 (D.C. Cir. 1956).

There is no evidence of congressional intent to link the branching authority of federal and state savings and loan associations, much less the branching authority of such associations to banks. Historically there has been separate treatment of banks and savings and loans. Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. §§1461 et *seq.* while expanding the powers of federal savings and loans, continued to significantly circumscribe the powers of savings and loans in comparison to the powers of banks and to maintain the traditional differences between banks and savings and loans.

In anticipation of Garn-St. Germain, Mississippi enacted a law that automatically expands the powers of Mississippi sav-

ings and loans with the expanded powers of federal savings and loans. Miss. Code Ann. §81-12-49(r) (Supp. 1986). The powers of savings and loans continue to be restricted, in comparison to banks. The Garn-St. Germain Act was intended "to provide additional asset flexibility and earnings opportunities to thrift institutions in the long-term by limiting such powers. The Garn-St. Germain Act maintains the traditional distinctions between commercial banks and thrift institutions." 128 Cong. Rec. S12213 (daily ed. Sept. 24, 1982).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE COURT OF APPEALS IS CONTRARY TO HOLDINGS OF THIS COURT

This Court has already addressed the issue of the extent to which state law should be applied in determining whether a national bank may engage in branch banking under the McFadden Act.

The Comptroller in *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 87 S.Ct. 492 (1966), as in this case, argues that a national bank is not confined by state branching restrictions. The Comptroller contended that since the state permitted branching by banks by taking over an existing bank, a national bank could branch. Under the Comptroller's view of the McFadden Act, state law governs only "whether" and "where" branches may be located. The McFadden Act does not set forth the "method" of branching. This Court rejected the Comptroller's selective use of the state statute and held that "[i]t is a strange argument that permits one to pick and choose what portion of the law binds him" (*id.* at 261). This Court also held that restrictions that are part and parcel of the state law governing branching are "absorbed by the provisions of §§36(c)(1) and (2) . . ." of the McFadden Act and that when a state expresses the conditions under which it will permit branching, "it expresses as much 'whether' and 'where' a branch may be located" as when it states an explicit geographic prohibition, *Id.* at 261-262. This Court concluded,

by holding that the McFadden Act has a clear-cut purpose of achieving "competitive equality" in branch banking. *Id.* at 261. This applies to financial institutions in Mississippi, Indiana and other amici states.

The decision below rests precisely upon the kind of selective use of state banking statutes that this Court found impermissible in *Walker*.

The Comptroller in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337 (1969) dealt with the issue of whether an armored car messenger service and other off-premises receptacles used by a national bank in Florida for the receipt of packages containing cash or checks for deposit constituted branch banks under the definition of a branch in Section 36(f) of the McFadden Act, 12 U.S.C. §36(f) (1927). The Comptroller, approved the national bank's use of off-premises receptacles, placing Florida state banks at a competitive disadvantage to national banks. Florida laws prohibited such branching by state banks. *Id.* at 124-25, 130-31, 138. This Court held that Section 36(f) of the McFadden Act makes no reference to state law and that the federal definition in that section was to be applied in a manner that would implement the underlying purpose of the branching requirements to assure competitive equality and preserve the dual system of banking. The *Walker* Court emphasized that "the congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." 396 U.S. at 138. This is precisely what has occurred in Mississippi and will occur in Indiana, and other similarily situated amici states if the Fifth Circuits decision stands.

The decision below is also in conflict with decisions of two district courts. In *State Chartered Banks in Washington v. Peoples Nat'l Bank of Washington*, 291 F. Supp. 180, 198-99 (W.D. Wash. 1966) the court held that a national bank could not take advantage of the branching privileges afforded state-chartered mutual savings banks, unless it met all of the requirements of the state statute governing mutual savings

banks. In *First Nat'l Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C (E.D. Okla. Nov. 15, 1982 and Dec. 17, 1982), trust companies are considered separate and distinct creations from state banks, not chartered as state banks, and not carrying on the banking business under authority of state law.

II. IF ALLOWED TO STAND, THE HOLDING OF THE COURT OF APPEALS WILL BE IN CONFLICT WITH THE DECISIONS OF TWO OTHER FEDERAL COURTS OF APPEALS

Both the Eighth and Ninth Circuits have held that the McFadden Act prohibits national banks from branching in a state to a greater degree than the state-chartered banks in that state. This also applies to the branching authority granted to other state financial institutions. The Fifth Circuit decision is in direct conflict with these decisions. The Eighth and Ninth Circuits' decisions are the benchmark of branching powers of all financial institutions.

The Comptroller in *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979), approved a relocation of a national bank branch in Washington state. The district court determined that a state-chartered bank would be prohibited from doing this. The Comptroller applied and relied on the same arguments presented by respondents in this case. Those arguments provide that even if state-chartered banks are precluded from such branching, national banks are not. *Id.* at 279. The Ninth Circuit held that the state law governing mutual savings banks in Washington did not provide a basis for national bank branch relocation. *Id.* at 279-80.

The reasoning from *Mutschler* is directly applicable here and puts the Ninth Circuit squarely at odds with the Fifth Circuit decision. The Ninth Circuit concluded that the references to state law in Sections 36(c) and 36(h) of the McFadden Act require that state law be used to determine the definition of "state bank." *Id.* at 279. A mutual savings bank, under Wash-

ington state law, is not a "state bank" therefore, the branching permitted Washington state mutual savings banks could not be used to justify branching by a national bank. *Id.* at 279-80. Even if a mutual savings bank in Washington were classified to be a "state bank," for purposes of the McFadden Act, the requirement of Section 36(c) of the McFadden Act that national bank branching rights are "subject to the restrictions as to location imposed by the law of the State on State banks" would prohibit a national bank from a branching as much as a mutual savings bank. An exception to this would be, if a national bank satisfied all of the provisions of the state statute governing mutual savings banks. *Id.* at 280. In order to branch, a national bank, like a state-chartered institution, would also have to meet the requirements imposed on a mutual savings bank.

In *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977), the Comptroller determined that a national bank was able to engage in branching under state law. The Comptroller held that the Bank of North Dakota, a state-owned bank, had no branching restrictions. The Eighth Circuit decided that Section 36(h) of the McFadden Act does not permit a national bank to branch in reliance on the branching privileges enjoyed by the state itself in its banking endeavors, when such branching is prohibited for private state-chartered banks. To hold otherwise, would be inimical to the policy of competitive equality and the dual system of banking between banks. *Id.* at 356.

III. THE QUESTION INVOLVED HAS A MAJOR IMPACT ON THE DUAL SYSTEM OF BANKING AND COMPETITIVE EQUALITY IN MISSISSIPPI, INDIANA, AS WELL AS, IN OTHER AMICI JURISDICTIONS

Indiana state-chartered banks under this holding, as well as, amici states would be subjected to competition from national banks with broader branching privileges. To prevent inequity in Mississippi, Indiana and other amici states similarily situ-

ated, the state legislature would be forced to expand branching privileges for state-chartered banks and state-chartered savings and loans. The McFadden Act has never intended to be construed expansively to accommodate national banks.

The Comptroller's unjustifiably expansive interpretation of the McFadden Act, has already been rejected in four previous cases. If the decision of the court below stands, there is potential to impose sweeping change in the nature of banking in Mississippi, Indiana and the amici states. This would be accomplished by administrative fiat. Thus state-chartered banks would be at a competitive disadvantage and would be compelled to convert their charter in order to make profits and stay competitive, unless the states bent to the Comptroller's will regarding branching rights. The theories of competitive equality and the dual system of banking would become dinosaurs.

This Court in *Clarke v. Securities Industry Association*, _____ U.S. _____, 107 S.Ct. 750, 764 n.3 (1987) refused to allow the Comptroller's "systematic attempt to secure for national banks branching privileges [a state] denies to competing state banks." This is the exact same issue in the case at bar.

The "dual banking system", as it exists in the United States today, is the historical outgrowth of more than a century of evolving bank regulation by the federal and state governments. *Wilmarth, The Case for the Validity of State Regional Banking Laws*, 18 Loy. A.L. Rev., 1017, 1020-34 (1985).

Between President Jackson's 1832 veto of the bill to renew the charter of the Second National Bank, and the Civil War, there were no national banks in the United States. By the passage of the National Currency Act of 1863 and the National Bank Act of 1864, Congress re-established national banks and gave them the sole power to issue currency, but until the passage of the Federal Reserve Act in 1913, did the federal and state governments operated completely separate and independent banking systems.

With the enactment of the Federal Reserve Act, bank supervisory powers of the federal and state governments began to

overlap. Today, state banks are subject to the laws of the states in which they are chartered, besides provisions of the Federal Reserve Act and other federal laws. Even those state banks which choose not to become members of the Federal Reserve System are still subject to the Federal Reserve Board's reserve-setting power under the Depository Institutions Deregulation and Monetary Control Act of 1980 Act of Mar. 31, 1980, Title I, Pub. L. No. 96-221, 94 Stat. 132 (amending 12 U.S.C. Section 461). Moreover any state nonmember bank which elects to obtain federal deposit insurance, as virtually all commercial banks do, becomes subject to the provisions of the Federal Deposit Insurance Act. 12 U.S.C. Sections 1811-32.

The constitutionality of federal regulation of state banks by the Federal Reserve Board in *Hiatt v. United States*, 4 F.2d 375 (7th Cir. 1924), *cert. denied*, 268 U.S. 704 (1925), as well as, by the Federal Deposit Insurance Corporation ("FDIC") in *Doherty v. United States*, 94 F.2d 495 (8th Cir. 1938) has been sustained on the grounds that membership and insurance are voluntary, and that a bank electing to accept the benefits of either may be required to accept regulatory controls.

Despite the increase in the power of the federal government over state banks since 1913, the essential outlines of the dual system of banking remains clearly discernible. The entry process, still is handled on a separate basis by the respective chartering authorities of the state and federal governments. Once having obtained a charter from one system, a bank may elect to convert to the other system to adjust to changing circumstances. The result has been one of the most flexible and best designed banking regulatory patterns in the world. If the Fifth Circuit's decision stands this would be destroyed.

Whatever may be the history of Federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the First National Bank Act of 1863, *National State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). The dual system offers at least three advantages which would not be available under a system that concentrated all charter-

ing and supervisory powers in a single agency. First, the provision for alternative routes of entry avoids, to a large extent, the possibility that a meritorious application will be rejected, either because of a mistake in appraising the prospects of or the need for a new bank, or because existing banks have mustered sufficient pressure to block the issuance of a new charter. Second, the provision for alternative supervisory schemes offers banks an opportunity to select a system which best satisfies their business needs. Third, the dual banking system requires both federal and state regulators.

In *Commercial Security Bank v. Saxon*, 236 F. Supp. 457, 460 (D.D.C. 1964), *aff'd sub nom. First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). *See also First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 130-34 (1969), the Court held:

> It seems clear to the Court that in order for the 'dual banking system' of the United States, consisting of state chartered banks and national banks, chartered under the National Bank Act of 1864 . . . , to continue to function as such, there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

The dual banking system depends for its continued existence upon the principle of equality. The Comptroller's decision in this instances, rather the states, establishes the conditions under which state banks can compete with national banks.

Thus, the continued vitality of dual banking is dependent upon the existence of a basic competitive balance or competitive equality on a "level playing field". All banks must be afforded approximately the same measure of operation. Clearly, if either of the two basic chartering systems were to offer substantially more liberal rights and privileges than the other, underprivileged banks would quickly convert to the more generous system, leaving the other system an empty

shell. Thus, the Fifth Circuit's decision would be contrary to the historic congressional commitment to the preservation of competitive equality between federal and state chartered banks. The Fifth Circuit's decision threatens to upset the desired balance between state and national banks, as well as, the entire banking structure of the nation and over one hundred years of tradition.

CONCLUSION

For the foregoing reasons, it is respectfully submittd that the petition for writ of certiorari should be granted.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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1988

QUESTION PRESENTED

Whether, under 12 U.S.C. 36, national banks may establish branches to the same extent as state savings associations, in a state where those associations are actively engaged in the business of banking in competition with national banks.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1575

DEPARTMENT OF BANKING AND CONSUMER FINANCE, STATE OF MISSISSIPPI, PETITIONER

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-44a) is reported at 809 F.2d 266. The opinion of the district court (Pet. App. 21a-31a) is reported at 617 F. Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1987. The petition for a writ of certiorari was filed on March 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(c) of the McFadden Act (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may do so, however, only

to the extent that "such establishment and operation are at the same time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). The term "State banks" is in turn defined "to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws." 12 U.S.C. 36(h).

In September 1984, respondent Deposit Guaranty National Bank (Deposit Guaranty), a national bank with its principal office in Jackson, Mississippi, applied to the Comptroller of the Currency for permission to establish a branch in Gulfport, Mississippi (Pet. App. 1a). Deposit Guaranty recognized that the Mississippi law then in force would not permit a state-chartered commercial bank based in Jackson to open such a branch, because state law permitted commercial banks to establish branches only within a 100-mile radius of their parent offices (Miss. Code Ann. § 81-7-7 (1972 & Supp. 1986)), and Gulfport is more than 100 miles from Jackson. Deposit Guaranty therefore based its application in large part on a factual showing that Mississippi *savings associations*, which were permitted under state law to branch state-wide (Miss. Code Ann. § 81-12-175 (Supp. 1986)), were actively engaged in the business of banking in competition with national banks. Accordingly, Deposit Guaranty argued, these competing institutions must be considered "State banks" within the meaning of Section 36(c) and (h), and national banks should be accorded the same state-wide branching authority that state savings associations enjoy.

The Comptroller granted Deposit Guaranty's application (Pet. App. 1a-20a). Relying on this Court's holding in *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), the Comptroller explained that the interpretation of the term "State banks," as used in Section 36(c) and defined in Section 36(h), is a question of federal law (Pet. App. 6a-7a). And because Section 36(h) defines "State banks" as

those institutions engaged, pursuant to state law, in "the banking business," the Comptroller ruled that the determination whether particular institutions are acting as "State banks" turns on whether they are, in fact, conducting those activities traditionally denoted as "banking" (Pet. App. 13a-15a). Looking for guidance to the National Bank Act, 12 U.S.C. 24 Seventh, and the decisions of this Court (see Pet. App. 15a (citing *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)), the Comptroller identified the essential activities characteristic of the "banking business" as the taking of deposits, the making of loans, and the cashing of checks (Pet. App. 14a-15a).

In this case, the Comptroller concluded that recent changes in both Mississippi and federal law permit Mississippi savings associations to offer "an 'entire menu' of financial services, including the essential functions of accepting deposits, making loans and paying checks (or their functional equivalents, negotiable orders of withdrawal)" (Pet. App. 16a; see *id.* at 17a). And on the record here, the Comptroller found that Mississippi savings associations are in fact "offering a range of products and services in competition with commercial banks, including NOW accounts, auto and other consumer loans, construction loans, and commercial loans. Furthermore, Mississippi savings associations have been actively marketing such products and services, often referring to them as 'banking' products and services or to themselves as 'banks.' " *Id.* at 19a (citation omitted). The Comptroller also considered evidence indicating that a substantial percentage of Mississippi households obtain their banking services from savings associations (*id.* at 19a-20a).

On the basis of this factual record, the Comptroller concluded that "Mississippi-chartered savings associations now offer a range of products and services that constitute the 'business of banking,' " and that those institutions are

therefore "in fact, carrying on the business of banking under authority of state laws" (Pet. App. 20a). Accordingly, the Comptroller ruled that Mississippi savings institutions are "State banks" within the meaning of the McFadden Act, and that Section 36(c) permits national banks to branch to the same extent as those savings institutions (*ibid.*).

2. Petitioner and several state commercial banks then brought this action in the United States District Court for the Southern District of Mississippi against the Comptroller and Deposit Guaranty, seeking both declaratory relief and an injunction against the opening of Deposit Guaranty's Gulfport office. Petitioner argued, as it had to the Comptroller, that the term "State banks" in Section 36(c) must be interpreted solely by reference to state law, a reading that would permit national banks to branch only to the same extent as those state-chartered institutions that the state chooses to label "banks" (Pet. App. 25a-26a). While finding petitioner's construction of the statute "not entirely persuasive," the district court nevertheless ruled in its favor, looking to "the legislative history of the McFadden Act and policy considerations" (*id.* at 26a). The court found dispositive its conclusion that the Comptroller's decision would give national banks a "competitive advantage" over state commercial banks (*id.* at 28a-29a); the court did not discuss the possible advantage that state savings associations now have in their competition with national banks.

The court of appeals reversed (Pet. App. 35a-44a). Recognizing that it was obligated to uphold the Comptroller's interpretation of Section 36 if that interpretation was a " 'permissible construction' " of the statute (Pet. App. 39a, quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)), the court of appeals agreed with the Comptroller that the interpretation of the term "State banks" in Section 36(c) and (h) is a question of

federal law. And the court also "agree[d] with the Comptroller that the language of § 36(h) expressly requires a consideration of function," "hold[ing] that the Comptroller was statutorily mandated to determine whether the Mississippi savings associations, some of which publicly refer to themselves as 'savings banks,' were actually 'carrying on the banking business' " (Pet. App. 42a). In making this observation, the court endorsed the Comptroller's conclusion that "the business of banking, stripped to its essentials, [is] accepting deposits, paying checks, and making loans" (*ibid.*; see *id.* at 37a).

Turning to the record, the court noted that the Comptroller's factual findings must be upheld unless "arbitrary or capricious" (Pet. App. 43a (citing 5 U.S.C. 706)). And here, the court concluded that the Comptroller's conclusions were "amply supported by the record" (Pet. App. 43a): Mississippi savings associations, "consistent with state law, accept deposits, pay interest on accounts, offer checking accounts, act in a fiduciary capacity, make personal loans, sell money orders and travelers' checks, service loans, manage investments, honor withdrawals from savings accounts, and purchase, sell, lease, and mortgage both personal and real properties" (*ibid.*). The court therefore upheld the Comptroller's ruling as "patently correct" (*ibid.*).

ARGUMENT

This case is the first in which the Comptroller, relying on a factual showing of actual competition between national banks and state-chartered savings institutions that are offering all of the essential banking services, treated such state institutions as "State banks" within the meaning of Section 36(c) and (h). His decision, as well as the holding below, plainly is compelled by the statutory language. The decision below, moreover, is unlikely to have continuing consequences, because a recent change in Mississippi law will eliminate the geographical distinction in the branching

authority of state-chartered commercial banks and savings associations. For all of these reasons, review of the decision below is unwarranted.

1. a. The decision below is based on the unremarkable proposition that the meaning of a federal statute is a matter of federal law. Here, the Comptroller concluded that the term "State banks" in Section 36(c) and (h) refers to all state financial institutions that offer essential banking services. See Pet. App. 41a. See generally *Chase Manhattan Bank* v. *Finance Admin.*, 440 U.S. 447 (1979); *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959). Petitioner, on the other hand, urges (Pet. 8) a view of the statute under which state law—including the *labels* that state law applies to various institutions—determines whether a given institution is a "State bank" within the meaning of Sections 36(c) and (h). Under this view, the Comptroller would be required to analyze branching requests solely with reference to institutions that the state chooses to call "banks," whether or not other institutions perform the same functions as, and are in fact fully competitive with, national banks.

This Court rejected an identical approach to another term used in the McFadden Act—"branch," which is defined in 12 U.S.C. 36(f)—in *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). There the Court recognized that, while an analysis of the *substance* of state law plays a role in the Comptroller's decisions under the McFadden Act, state law labels cannot be controlling, since the states would then be "the sole judges of their own powers." *Id.* at 133. That Congress did not intend such an "improbable result" was, the Court held, obvious from the fact that Congress had provided a definition of the term "branch" in the statute itself. *Id.* at 133-134. Similarly, Congress' decision to define "State banks" in Section 36(h) to include all "corporations or institutions carrying on the

banking business under the authority of State laws" demonstrates its intent that such "banks" be identified by their banking activities, rather than by state law labels.

Petitioner attempts to avoid this conclusion by reference to the McFadden Act's general policy of "competitive equality" between national and state banks (Pet. 11). See generally *Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 20. In this case, however, that policy weighs on both sides of the scale, and on balance supports the Comptroller's determination. While the Comptroller's decision here may give national banks in Mississippi greater branching authority than that enjoyed by state commercial banks, a contrary ruling would give state savings associations—which were found by the Comptroller and the court below to be in competition with national banks—a significant competitive advantage over national banks.

Resolution of this dilemma, created by the rapidly changing competitive situation in the financial services industry, is precisely the sort of matter on which deference to an agency's statutory interpretation should be at its height. See *Independent Bankers Ass'n* v. *Marine Midland Bank*, 757 F.2d 453, 461 (2d Cir. 1985), cert. denied, No. 84-2023 (June 16, 1986). And here, as the court of appeals indicated, the Comptroller's resolution serves the fundamental congressional purpose of maintaining competitive equality between state and federal banking by ensuring that " 'neither *system* have advantages over the other in the use of branch banking' " (Pet. App. 41a, quoting *Plant City*, 396 U.S. at 131 (emphasis added)).

b. Petitioner appears to argue that, if national banks are permitted branching authority equivalent to that of state savings asociations, national banks must comply with all of the state-imposed substantive restrictions on the activities

of those associations.[1] But the McFadden Act, in Section 36(c) (emphasis added), applies to national banks only "restrictions *as to location* imposed by the law of the State." As the emphasized language makes clear, this section incorporates only state limitations on branching, not the provisions of state law that regulate the substance of the activities of financial institutions. *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966), on which petitioner chiefly relies (Pet. 9-11), involved just such a branching restriction. There the Court held that the limitation in question—a state law that permitted the establishment of a branch only through acquisition of an existing bank—was part and parcel of the state's branching policy, "express[ing] as much 'whether' and 'where' a branch may be located" as a strictly geographical restriction (385 U.S. at 262). The Court did not suggest that a state could compel a national bank to comply with regulatory restrictions of substantive state banking law as a condition of enjoying the banking privileges accorded to "State banks."

Indeed, the McFadden Act itself expressly provides that institutions differing from commercial banks in some particulars—"trust companies" and "savings banks"—may qualify as "State banks" whose branching authority sets the standard for branching by national banks. 12 U.S.C. 36(h). Yet Congress could hardly have intended the substantive state law restrictions on those types of institutions to be applicable to national banks.

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[1]As petitioner notes, Mississippi law imposes certain restrictions on state savings associations that are not applicable to state commercial banks, such as percentage limitations on the amount of their assets that they may devote to given classes of lending (Pet. 5). But petitioner has never challenged the Comptroller's factual findings that, notwithstanding such limitations, Mississippi savings associations are actively and successfully engaged in a range of activities that in fact constitute the business of banking, in competition with national banks (Pet. App. 19a-20a).

2. The conflict in the circuits asserted by petitioner on this point is illusory. In *Mutschler* v. *Peoples Nat'l Bank*, 607 F.2d 274 (1979), upon which petitioner principally relies (Pet. 8-9), the Ninth Circuit held only that a Washington "mutual savings bank" was not a "State bank" within the meaning of Section 36(c); the court concluded that "national banks cannot locate branches where under Washington law mutual savings banks [but not commercial banks] may locate as it would thus destroy the concept of competitive equality embodied in the [McFadden Act]." 607 F.2d at 280. While the Ninth Circuit looked to state law in reaching that conclusion (see *id.* at 279), it did so (as its reliance on notions of competitive equality make clear) in the absence of any indication that mutual savings banks in Washington in fact offered a full range of banking services in competition with national banks. Indeed, it appears that there was no evidence at all before the court of appeals (or the district court) about either the activities of mutual savings banks or the actual competitive situation in the state.[2] Thus, it is far from clear whether, if faced with a case comparable to this one—involving a set of state-chartered institutions that are empowered to, and do in fact, offer a full range of banking services in competition with national banks—the Ninth Circuit would take a position in conflict with the decision below.[3]

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[2]In fact, no evidentiary record was made before the Comptroller. See Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. Law & Comm. 243, 252 (1983). See also *Hart* v. *Peoples Nat'l Bank of Washington*, No. C75-416S (W.D. Wash. Feb. 18, 1976).

[3]It is doubtful that the Ninth Circuit will ever have occasion to consider such a case, because it appears that none of the states in that circuit afford savings institutions broader branching authority than commercial banks. See Pet. 12 n.6. Moreover, the holding of *Mutschler* itself is a dead letter; the State of Washington has amended its banking statute to permit branching of the sort disallowed in that case. See Wash. Rev. Code § 30.40.020 (West 1986 & Supp. 1987) (as amended by Laws 1986, ch. 279, § 39). We also note that the only federal

Petitioner's reliance on *Dakota Nat'l Bank & Trust Co.* v. *First Nat'l Bank & Trust Co.*, 554 F.2d 345 (8th Cir.), cert. denied, 434 U.S. 877 (1977) (Pet. 9), is also misplaced. The issue in that case was whether a state-owned financial institution was a "State bank" within the meaning of Section 36(h). The court held only that the state institution was "in effect an arm of the state of North Dakota," and concluded that "competitive equality was intended to be maintained between the privately-owned banking institutions, state and federal, rather than between the national banks and the *state itself* in its banking endeavors." 554 F.2d at 356 (emphasis in original). That holding obviously has no relevance here.

3. Finally, even if the question presented in this case were otherwise appropriate for consideration by this Court, a compelling prudential factor militates against review: the decision below will not have continuing effects. Prior to the court of appeals' ruling in this case, the State of Mississippi amended its banking law to phase out the geographic limitations on branching by commercial banks. This phase-out begins on July 1, 1987 (when the 100-mile limit will be extended to 150 miles), and will be concluded on July 1, 1989 (when state-wide branching will be permitted). See Miss. Code Ann. § 81-7-7 (Supp. 1987). Thus, a ruling by this Court on the merits of this case would have only a limited practical impact.

In an attempt to demonstrate the importance of the issue here, petitioner suggests that 22 states grant broader branching authority to certain savings institutions than to

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authority cited by the court of appeals in *Mutschler* was the district court opinion in *State Chartered Banks* v. *Peoples Nat'l Bank*, 291 F. Supp. 180 (W.D. Wash. 1966). *State Chartered Banks* (upon which petitioner also relies, Pet. 9 n.5) was decided prior to this Court's ruling in *Plant City*, and expressly adopted the now-discredited view that Section 36(f)'s definition of "branch," as well as Section 36(h)'s definition of "State bank," is controlled by state law. See 291 F. Supp. at 196.

commercial banks (Pet. 11-13 & n.6). But the issue presented in this case can arise only in a state that also allows state savings institutions to engage in the business of banking in competition with national banks (and with state commercial banks). Determining whether that is the case in any given setting requires a factual inquiry by the Comptroller. Indeed, in the time since the Comptroller granted Deposit Guaranty's application, he has taken final action in only one other similar case, and in that case *denied* the branching application—by a Georgia bank—on the ground that the application "fail[ed] to demonstrate that the state-chartered thrifts in Georgia are indeed 'carrying on the banking business.' "[4] Petitioner's concern that the issue here will arise in the future is thus wholly hypothetical.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

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[4]See March 31, 1987, letter from Ballard C. Gilmore, Director for Corporate Activity, Bank Organization and Structure, to Richard R. Cheatham (attached as an appendix to this brief).

APPENDIX

Comptroller of the Currency
Administrator of National Banks
Washington, D.C. 20219
March 31, 1987

Mr. Richard R. Cheatham
Kilpatrick & Cody
Suite 3100
100 Peachtree Street
Atlanta, Georgia 30043

Dear Mr. Cheatham:

This is to inform you that the request by First South Bank, National Association, Fort Valley, Georgia, to establish a branch at the intersection of Cherry and First Streets, Macon, Georgia, has been disapproved. This Office is authorized by 12 U.S.C. 36 to approve applications for national banks to establish branch offices at locations "authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively." The term "State bank" is defined in 12 U.S.C. 36(h) as those institutions which are "carrying on the banking business" under state law. The application fails to demonstrate that the state-chartered thrifts in Georgia are indeed "carrying on the banking business."

Sincerely,

/s/ BALLARD GILMORE
Ballard C. Gilmore
Director for Corporate Activity
Bank Organization and Structure

No. 86-1575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DEPARTMENT OF BANKING AND CONSUMER FINANCE OF THE STATE OF MISSISSIPPI,
Petitioner,

v.

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, AND DEPOSIT GUARANTY NATIONAL BANK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

STATUTES AND ADMINISTRATIVE RULINGS:

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR THE PETITIONER

In opposition to the Petition, Respondents Deposit Guaranty National Bank ("Deposit Guaranty") and Robert L. Clarke, Comptroller of the Currency ("Comptroller"), gloss over and never deny the critical point in this case which warrants the granting of this petition: if Respondents prevail, national banks in Mississippi will achieve a competitive advantage in the matter of branching over the 117 state-chartered banks in Mississippi, a result which this Court repeatedly has held is precluded by the McFadden Act of 1927, 12 U.S.C. § 36 (1982), the Act governing the branching authority of national banks. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

Further, the particular theory employed by Respondents to avoid this mandate and permit a national bank to engage in branching prohibited for state-chartered banks has been faced in four prior cases, including two decisions of United States courts of appeals, deciding, as the district court below decided, that the McFadden Act prohibits national banks from obtaining such a competitive advantage over state banks by the device of relying upon the branching authority of other financial institutions chartered by a state.[1] The opinion of the Fifth Circuit below stands as the *only* decision to the contrary, adopting a legal theory which would eviscerate the branching restrictions of the McFadden Act as to state banks in Mississippi and twenty-one other states.[2] Accordingly,

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[1] *See Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979); *Dakota National Bank & Trust Co. v. First National Bank & Trust Co. of Fargo*, 554 F.2d 345 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977); *Department of Banking & Consumer Finance of the State of Mississippi v. Selby*, 617 F. Supp. 566 (S.D. Miss. 1985) (App. at 21a); *First National Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C (E.D. Okla. Nov. 15, 1982 and Dec. 17, 1982); *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash. 1966).

[2] Petition for Certiorari ("Petition") at 11-12.

Mississippi has now been joined by eight states as *amici curiae* in seeking a review of the decision below.

THE DECISION OF THE FIFTH CIRCUIT CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *WALKER* AND *PLANT CITY*.

Plunging through all of the language in the decision of the Fifth Circuit, and in Respondents' briefs, one incontrovertible fact remains: under the construction given to Section 36(c) of the McFadden Act by the Fifth Circuit, national banks would have greater branching powers than state chartered banks. This outcome is directly contrary to the holding of this Court that the purpose of this statutory provision is to "place national and state banks on a basis of 'competitive equality' insofar as branching [is] concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. at 261. *That is a clear-cut conflict.*[3]

The Comptroller attempts to justify refusal to consider the Mississippi state law distinctions between banks and savings and loans by analogizing this case to the decision of this Court to use a federal definition of "branch" for purposes of 12 U.S.C. § 36(f). Comptroller Br. at 6. *See*

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[3] Respondents attempt to distinguish this Court's decision in *Walker* by arguing that a national bank need comply only with state law "specifically regulating branching." Brief of Deposit Guaranty ("Desposit Guaranty Br.") at 9; Brief of Robert L. Clarke, Comptroller of the Currency of the United States ("Comptroller Br.") at 8. It would be absurd for Mississippi to have to restate, in the branching restriction provisions governing savings and loans, the other requirements that a financial institution must meet to qualify as a savings and loan within the meaning of the statute (and thereby enjoy state-wide branching); yet, that is effectively what Respondents argue the state must do under *Walker* before those requirements apply to branching. This is *precisely* the sort of selective use of the state statute that this Court rejected in *Walker*: "It is a strange argument that permits one to pick and choose what portion of the law binds him." *Id.* at 261. Far from endorsing selective use of the state statute, this Court in *Walker* ruled that all of the state "policy" regarding branching is absorbed into Section 36(c) of the McFadden Act. *Id.* at 262.

First National Bank in Plant City v. Dickinson, 396 U.S. 122. However, in so doing, the Comptroller ignores the critical distinction between 12 U.S.C. § 36(f), which makes no reference to state law, and 12 U.S.C. §§ 36(c) & (h) (1982), which specifically incorporate state law. This precise distinction between Section 36(f) and 36(c) was confirmed by this Court in *Walker*, 385 U.S. at 261-62.[4]

Respondents rely heavily on powers recently given to savings and loans. However, in providing for these new powers, Congress has maintained a distinction between banks and savings and loans just as Mississippi has maintained this distinction in very elaborate form.[5] As the Fifth Circuit below noted: as recently as the Garn-St. Germain Act, Congress has made clear its intention to maintain the status of savings and loans "as the nation's primary home lender," with a regulatory scheme that "differs from the regulation of the traditional bank." App. at 43a-44a. Similarly, as the district court below stated in its opinion:

> The branching provisions relevant to commercial banks and savings associations are part of a legislative scheme devised by the Mississippi legislature to insure that both types of institutions will provide the best service to Mississippi consumers.

App. at 28a. While some functional similarities may exist, the facts of significance are that, under Mississippi law, banks are legally and functionally different from savings and loans. The McFadden Act obliges the Comptroller to accept that difference. In *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), this Court specifically rejected an effort by the Board of Governors to extend its jurisdiction to "nonbank banks" based on use of a functional definition of banks in lieu of the definition contemplated by the statute and in the legislative

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[4] *See* Petition at 10.

[5] *See* Petition at 6 n.4. *Compare* Miss. Code Ann. §§ 81-1 *et seq.* through §§ 81-9 *et seq.* (1972 & Supp. 1986) *with* §§ 81-12 *et seq.* (Supp. 1986).

history. *Id.* at 685-89.[6] This Court has mandated that "the Congressional policy of competitive equality with its deference to state standards [is not] open to modification by the Comptroller of the Currency." *First National Bank in Plant City v. Dickinson*, 396 U.S. at 138.[7]

RESPONDENT DEPOSIT GUARANTY HAS MISSTATED MISSISSIPPI STATUTORY LAW AND, AS A RESULT, THE ISSUE IN THIS CASE.

In a misleading effort to buttress Respondents' "functional" basis for ignoring the considerable differences between banks and savings and loans under Mississippi law, Deposit Guaranty contends that Petitioner incorrectly identifies institutions as "savings and loans" that should be called "banks" under the Mississippi Code.[8] This is wrong.

The term "savings and loan" is specifically incorporated into the definition of the institutions governed by the Mississippi Department of Savings Associations (*see* Miss. Code Ann. § 81-12-3(a) (Supp. 1986)), the entity

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[6] In fact, the Fifth Circuit's conclusion that NOW accounts offered by Mississippi savings associations (Miss. Code § 81-12-149 (Supp. 1986)) are the equivalent of bank payment-on-demand checking accounts runs afoul of *Dimension*. App. at 17a, 19a. This Court in *Dimension* specifically rejected an effort to use a "functional" definition to include institutions within the definition of bank based on the similarities between NOW accounts and payment-on-demand checking accounts, notwithstanding that they "have much in common" and "generally serve the same purpose." *Id.* at 689.

[7] The recent decision of this Court in *Clarke v. Securities Industry Ass'n*, 107 S. Ct. 750 (1987), provides no basis for concluding otherwise. This Court's decision that discount brokerage offices operated by banks are not embraced by the McFadden Act has nothing to do with the issue in this case. However, just as a review of historical circumstances made it clear that a securities business conducted by a bank is not covered by the Act (*Id.* at 760-62), a review of historical circumstances makes it clear that Congress did not intend to include savings and loans in the McFadden Act. *See* Petition at 5 n.3, 13.

[8] Deposit Guaranty Br. at 1-4.

charged with the execution of all laws "relating to associations carrying on *savings and loan* business in this state." Miss. Code Ann. § 81-12-11(1) (Supp. 1986) (emphasis added). In contrast, the term "bank" is never used anywhere in the Mississippi code to refer to savings associations or savings and loans. Every corporation "carrying on a commercial banking business, or the business of a savings bank, or trust company" is to be chartered as a "bank" and regulated by Petitioner. Miss. Code Ann. § 81-3-3 (1972).[9]

Given the broad and clear distinctions in Mississippi law between banks and savings and loans, it is misleading for Deposit Guaranty to refer to savings and loans as "banks," and then to use that reference to justify state-wide branching by a national bank. The McFadden Act expressly prohibits such a loose interpretation of its branching requirements.[10]

THE DECISION BELOW IS CLEARLY IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS.

Respondents make a number of grievous errors in an effort to explain away the obvious conflict between the decision below and the decisions of the Eighth and Ninth Circuits, *e.g.*, *Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274; and *Dakota National Bank*

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[9] The decision below erroneously refers to this statute as a "former" law. App. at 38a. However, it is still the law in Mississippi. Given the absence of any support in Mississippi statutes for its position, Deposit Guaranty must rely upon an administrative rule of the Mississippi Department of Savings Associations, which permits savings and loans chartered under Mississippi law to use the words "savings bank." *See* Miss. Savings Rule 16.1. That administrative ruling, however, in no way repeals, amends, or changes the clear-cut provisions of Mississippi state law distinguishing between banks and savings and loans.

[10] *See* 12 U.S.C. § 36(c) (1982).

& Trust Co. v. First National Bank & Trust Co. of Fargo, 554 F.2d 345.[11]

The argument of Respondents that no conflict exists contradicts the earlier action of the Comptroller, who clearly recognized the conflict in his decision below (upheld by the Fifth Circuit). App. at 8a-12a. Similarly, the district court below noted that "*the Comptroller's position has been rejected by every court that has considered it. . . .*" App. at 30a n.15 (emphasis added).[12]

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[11] Deposit Guaranty also erroneously attempts to distinguish the two district court cases on point, both of which support Petitioner. *See First National Bank & Trust Co. of Okmulgee v. Empie*, Nos. 78-296-C and 79-315-C; *State Chartered Banks in Washington v. Peoples National Bank of Washington*, 291 F. Supp. 180. The Comptroller misses the point on these two cases entirely, focusing on an irrelevant aspect of the *State Chartered Banks* decision (an analysis of 12 U.S.C. § 36(f)) and ignoring the *Empie* decision. Comptroller Br. at 9.

[12] By contrast, none of the arguments advanced by Respondents claiming an absence of a conflict have merit. First, Respondents cite an article, written by a trial attorney with the Comptroller of the Currency, faulting the factual record and reasoning of the courts in *Dakota National Bank* and *Mutschler*, but which, contrary to Deposit Guaranty's contention, never says they would not be in conflict with a decision such as the decision below. Deposit Guaranty Br. at 7; Comptroller Br. at 9. *See* Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. 243, 251-53 (1983). Second, Deposit Guaranty chides Petitioner for not seeking a rehearing before the Fifth Circuit concerning this conflict. Deposit Guaranty Br. at 6-7. Yet, the failure of the Fifth Circuit below to address the conflict issue was specifically called to the court's attention in Petitioner's February 25, 1987 Motion For a Stay of Mandate Pending Petition For Certiorari to the United States Supreme Court, *granted* on March 5, 1987. Third, Deposit Guaranty *assumes* that the courts in *Mutschler, Dakota National Bank, Empie* and *Peoples National Bank* were dealing with financial institutions that were, in Respondents' parlance, functionally different from Mississippi savings and loans. Deposit Guaranty Br. at 7-9. In fact, in the *Dakota National Bank* case, the state bank would be a "bank" under Respondents' definition. *See* N.D. Cent. Code § 6-09-02 (1975). While the Comptroller now states that the *Dakota National Bank* case dealt with a com-

Most importantly, however, Deposit Guaranty ignores the reasoning of the decisions with which the Fifth Circuit is in conflict. These courts did not question the national banks' contentions that they were facing competition from the state financial institutions involved. However, under the reasoning of these courts, that fact was insufficient. These courts reasoned that, in any event: (1) the institutions upon which the Comptroller relied to establish branching authority for national banks did not fit within the meaning of state banks in the McFadden Act, and (2) allowing the claims of the national banks would put state chartered commercial banks at a competitive disadvantage in the matter of branching.[13]

Ironically, if the decision of whether an institution is a bank under Section 36(h) of the McFadden Act, 12 U.S.C. 36(h), turned, as Deposit Guaranty suggests,[14] on whether the institution was authorized by state law to use in its name the word "bank" or some other word used in Section 36(h), the conflict between the cases noted above and Deposit Guaranty's reasoning is even more sharply outlined. They all involved institutions with the section 36(h) words "bank" or "trust company" in their names.[15] Thus, irrespective of whether

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pletely different issue (Comptroller Br. at 9-10), in that case the Comptroller was claiming that a competing state bank had an unfair competitive advantage in branching, just as Respondents now claim in this case. Finally, the article on which Respondents rely recognizes that, in at least one of these cases, *Empie*, the court had before it a carefully developed record and a Comptroller decision based on the reasoning advanced by Respondents in this case; but that reasoning was rejected by the court. *See* Griffin, *Branching by National Banks: Must the "(h)" Always Be Silent?*, 3 J. of L. & Com. at 252-55.

[13] *See* Petition at 7-9.

[14] Deposit Guaranty Br. at 1-2, 5.

[15] *Mutschler*, 607 F.2d at 279 ("mutual savings bank"); *Dakota National Bank*, 554 F.2d at 355 ("Bank of North Dakota"); *Empie*, Nos. 78-296-C and 79-316-C, slip op. at 6 ("trust companies"); *State Chartered Banks*, 291 F. Supp. at 199 ("mutual savings bank").

the focus is on function or form, the decision below is in conflict with the circuit court decisions in *Mutschler* and *Dakota National Bank*, as well as the district court decisions in *Empie* and *State Chartered Banks*.

Ultimately, even Deposit Guaranty was forced in its brief to admit that the Fifth Circuit decision below is in conflict with the Ninth Circuit decision in *Mutschler*.[16] Deposit Guaranty argues that the Ninth Circuit was in error when it explained that even if a mutual savings bank was a "state bank" for purposes of the McFadden Act, the requirement of Section 36(c) of the McFadden Act that national bank branching rights are "subject to the restrictions as to location imposed by the law of the State on State banks" means that a national bank may not avail itself of the branching rights of such a mutual savings bank unless the national bank satisfies all of the provisions of the state statute governing mutual savings banks. *Id.* at 280. This is a conflict which should be resolved by this Court.[17]

THIS COURT SHOULD NOT LET THIS CASE STAND AND DEFER RESOLUTION OF THE IMPORTANT ISSUE RAISED HERE.

As Respondents have correctly noted, Mississippi changed its law in April 1986 to include a graduated ex-

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[16] Deposit Guaranty Br. at 15-17.

[17] Deposit Guaranty Br. at 15-17. While denying the confiict, the Comptroller makes the same argument. Comptroller Br. at 8-9. The resolution of that conflict is, of course, a function for this Court following a grant of the Petition. Petitioner's position is that Respondents are wrong. The Ninth Circuit approach is precisely what Petitioner argues for here. The Comptroller invokes an asserted right to make his own determination when there has been a rapid change in the industry. Comptroller Br. at 7. However, just last year this Court rejected a similar effort by the Comptroller to invoke his expertise in contravention of the language and history of the applicable legislation, in response to rapid change that had placed banks in competition with "non-bank banks." *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681.

pansion of branching rights for state chartered banks.[18] It is important to note, however, as recognized by Deposit Guaranty at page 11 of its brief, that "the new statute does *not* give the banks petitioner regulates complete equality in branching with the banks [sic] regulated by the Department of Savings Associations." (Emphasis added.) Mississippi is entitled to the full protection of the McFadden Act as it phases in these changes in its law.

Under the reasoning of the Fifth Circuit below, contrary to the fundamental purpose of the McFadden Act and all of the prior decisions interpreting that Act, the state-chartered banks in twenty-two states may be subjected to competition from national banks with broader branching privileges. To prevent that inequity, this Court should follow the request of Mississippi and the eight *amici* states by taking this opportunity to resolve the important issue raised by this case.[19]

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[18] *See* Miss. Code Ann. § 81-7-7(5) (Supp. 1986).

[19] The single decision of the Comptroller in a recent Georgia case (Comptroller Br. at 10-11) does not alter the legitimate concerns of these states, as indicated by the decisions of eight states to file an *amici* brief in support of the Petition. Even if some states presently do not grant their savings and loans powers that the Comptroller would determine make them functional equivalents of banks, that situation is likely to change as states respond to the increased powers granted to federal savings and loans by the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 1461 *et seq.* (1982 & Supp. III 1986). *See* Petition at 6 n.4.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

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